SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

RENEW 81 FOR ALL, by its president Frank L. Fowler,
CHARLES GARLAND, GARLAND BROTHERS FUNERAL HOME,
NATHAN GUNN, ANN MARIE TALIERCIO,
TOWN OF DEWITT, TOWN OF SALINA, and TOWN OF TULLY,

Petitioners,

vs.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
MARIE THERESE DOMINGUEZ, in her official capacity as the
Commissioner of New York State Department of Transportation,
NICOLAS CHOUBAH, P.E., in his official capacity as the
New York State Department of Transportation Chief Engineer, and
MARK FRECHETTE, P.E., in his official capacity as the
New York State Department of Transportation I-81 Project Director,

Respondents,

and

THE CITY OF SYRACUSE,

Intervenor-Respondent.

REPLY MEMORANDUM OF LAW

Index No.: 007925/2022

PETITIONERS' REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

Petitioners Renew 81 for All, by its President Frank L. Fowler, Charles Garland, Garland Brothers Funeral Home, Nathan Gunn, Ann Marie Taliercio, Town of DeWitt, Town of Salina, and Town of Tully (collectively, "Petitioners") submit this Reply Memorandum of Law in further support of their Verified Petition ("Petition"). Petitioners in this CLPR Article 78 proceeding seek an Order and Judgment, pursuant to CPLR Article 78, the State Environmental Quality Review Act ("SEQRA"), the Smart Growth Act, the Climate Leadership and Community Protection Act ("CLCPA"), Article I § 19 of the New York State Constitution (the "Green Amendment"), and/or otherwise, with respect to the Interstate 81 ("I-81") Viaduct Project P.I.N. 3501.06 (the "Project"): (1) vacating, annulling, and declaring illegal, invalid, null and/or void the May 31, 2022 Joint Record of Decision and Findings published on June 2, 2022, as supplemented in June, 2022 (the "ROD"), the Final Design Report/Final Environmental Impact Statement/Final Section 4(f) Evaluation (the "EIS"), the review of the Project under SEQRA ("SEQRA Review"), and any other approvals ("Approvals") issued by Respondents New York State Department of Transportation ("NYSDOT"), Marie Therese Dominguez, Nicolas Choubah, P.E., and/or Mark Frechette, P.E. (collectively "State Respondents" or the "State"); (2) directing the State Respondents to proceed with an alternative for the Project that complies with SEQRA, the Smart Growth Law, CLCPA, and the Green Amendment; and (3) granting such other and further relief as this Court deems just and proper, including Petitioners' costs and disbursements. This Reply Memorandum responds to answering papers submitted by the State Respondents and Respondent-Intervenor City of Syracuse ("City").

The State Respondents adopted the "Community Grid" Alternative for the Project, which would demolish the I-81 viaduct running through the center of Syracuse (the "Viaduct"), de-designate this section of I-81 as an interstate highway, and route Interstate traffic through a system of grade-level intersections with up to 13 to 20 traffic lights through several Syracuse neighborhoods. Petitioners are a diverse but unified coalition of residents and stakeholders who seek to annul the Approvals because, *inter alia*, the SEQRA Review for the Project failed to comply with the requirements of SEQRA (including the SEQRA regulations set forth at 6 N.Y.C.R.R. Part 617, and NYSDOT Procedures for Implementation of SEQRA at 17 N.Y.C.R.R. Part 15), as well as other legal requirements.

As stated in greater detail below, and in the accompanying Reply Affirmation of Linda Shaw and Affidavit of Charles Garland, the State Respondents have failed to rebut Petitioners' central contentions. The SEQRA analysis was fatally flawed in several respects, both procedurally and substantively. The State engaged in impermissible segmentation, failed to properly mitigate adverse impacts, and failed to adequately analyze key areas of environmental concern. Their decisionmaking was based on fundamentally flawed data, and they impermissibly unilaterally designated NYSDOT as lead agency. As recently issued legal decisions establish, the State also failed to meet their obligations under New York State's Green Amendment, and under CLCPA. Finally, Respondents' attempt to relitigate the issue of FHWA's status as a necessary party should not be permitted, but if this issue is addressed, they have offered no reason for the Court to reach a different result.

LEGAL ARGUMENT

POINT ONE

THE STATE RESPONDENTS VIOLATED SEQRA

A. The NYSDOT Regulations Do Not Allow the State Respondents To Avoid Strict Compliance with SEQRA.

As an initial matter, the State Respondents' opposition papers amount largely to attempts to provide excuses for their various failures to comply with the strict mandates of SEQRA. At the outset it should be noted that such excuses should not be credited, as SEQRA requires "literal" or "strict compliance." *King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341 (1996); *Taxpayers Opposed to Floodmart, Ltd. v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958 (4th Dep't 1995); *Badura v. Guelli*, 94 A.D.2d 972, 973 (4th Dep't 1983). The courts have uniformly held that "substantial compliance" with SEQRA is insufficient. *Id.*

First, the vast majority of both the City and the State's submissions amount to nothing more than a bare appeal to general principles of administrative deference. Though it is true that SEQRA determinations are entitled to some amount of judicial deference, that deference is not controlling where, as here, the agency fails to perform a necessary analysis, fails to make necessary findings on an issue of clear environmental significance, fails to meet the standard for literal procedural compliance, or makes findings that are not supported by the evidence. *Penfield Panorama Area Comm., Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342 (4th Dep't 1999); *City of Glens Falls v. Board of Educ. of Glens Falls City Sch. Dist.*, 88 A.D.2d 233 (3d Dep't 1982); *Baker v. Village of Elmsford*, 70 A.D.3d 181 (2d Dep't 2009); *Falcon Grp. LLC v. Town/Village of Harrison Planning Bd.*, 131 A.D.3d 1237 (2d Dep't 2015).

The State Respondents largely decline to address these rules, repeatedly pointing to the voluminous record and the lengthy pendency of the Project as purported proof that the environmental analysis was not flawed, without addressing the substance of Petitioners' arguments. The length of the administrative record does not save an otherwise faulty procedure.

More directly, the State repeatedly makes the astounding claim that it is not required to meet the various SEQRA mandates which Petitioners cite because NYSDOT's own regulations have somehow superseded these requirements.[1] This is not the case. In fact, NYSDOT has been specifically advised that this argument lacks merit by the Court of Appeals in *Village of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 71 (1989). There, the petitioners argued that "NYSDOT's regulations are less protective of the environment than are those of NYSDEC and, therefore, NYSDEC's must control." The Court of Appeals agreed. *Id*. This is a well-settled premise.

Though the Legislature recognized that various agencies would promulgate their own SEQRA procedures and regulations,[2] the controlling principle is that those regulations and procedures must be "at least as protective of SEQRA's policies as the statute and regulations." *Coca-Cola Bottling Co. of New York v. Bd. of Estimate of City of New York*, 72 N.Y.2d 674, 681 (1988). This principle must control in all instances of Respondents' submissions where they seek to excuse their various SEQRA violations by citation to less stringent NYSDOT regulations.

[1] While the State Respondents suggest the Petition did not allege violations of the NYSDOT regulations, in fact Petition ¶ 4 defines "SEQRA" as "including the… NYSDOT Procedures for Implementation of SEQRA at 17 NYCRR Part 15."

[2] The NYSDOT SEQRA regulations were filed in 1979 after SEQRA went into effect on September 1, 1976, and last revised on December 18, 1987, effective January 6. 1988. Since that time, the NYSDEC SEQRA regulations have been revised several times to provide stronger and more detailed requirements, including significant revisions filed on Sept. 20, 1995, effective Jan. 1, 1996, and on June 27, 2018, effective Jan. 1, 2019, but NYSDOT has not kept pace.

B. Lead Agency Status Was Improperly Designated.

The State asserts that NYSDOT attained lead agency status without seeking comment or consent of other involved agencies by operation of NYSDOT's own regulations. Leslie Aff. (Dkt. No. 41) at ¶ 17. However, this side-stepping of mandated SEQRA procedures is impermissible. As the Court in *Westbury* recognized, the principle that NYSDOT's regulations must be at least as protective as NYSDEC's general SEQRA regulations applies equally to procedural requirements. There, the Court held that NYSDOT "should process the proposed action in the same way Type I actions are processed under NYSDEC regulations," based on the requirement that NYSDOT's regulations not be applied in a manner less protective of the environment than NYSDEC's. *Id*.

An identical issue was raised in *Coca-Cola Bottling Co. of New York v. Bd. of Estimate of City of New York*, 72 N.Y.2d 674 (1988). There, another agency attempted to exercise its rule-making authority to designate certain agencies as "permanent lead agencies" under SEQRA. *Id.* at 679. The Court of Appeals, citing the requirement under ECL § 8-0113 that "such individual agency procedures shall be no less protective of environmental values, public participation, and agency and judicial review than the procedures herein mandated," found that default lead agency process lacking and annulled the resulting determination. *Id.* at 681-82. The same result should be reached here.

As the Court in *Westbury* held, the action here should be processed "in the same way Type I actions are processed under NYSDEC regulations." *Westbury*, 75 N.Y.2d at 72. Coordinated SEQRA review was therefore required for the Project under 6 N.Y.C.R.R. § 617.6(b)(3), but that did not happen. The State Respondents were required to go through the process set forth at 6 N.Y.C.R.R. § 617.6(b)(3) to designate a lead agency, including circulation of an environmental assessment form to the involved agencies and seeking their agreement to lead agency designation.

Nothing in the record demonstrates that this process occurred. It appears that all other potentially involved agencies were entirely excluded from the lead agency designation process, including the agencies of the various municipalities in which the Project is sited, which were identified under the federal NEPA process as "Participating Agencies." *See* A.R. 376, 377, 379, 383.[3] These involved agencies include NYSDEC, which must approve, *inter alia*, wetland, stream, and water pollution permits, taking of endangered or threatened species, and remediation of contaminated properties, is clearly bound by its own SEQRA regulations to go through the lead agency designation process, and is better suited to oversee environmental protection than NYSDOT, which is the proverbial "fox guarding the hen house."

This deficient process is plainly not as protective as the mandated SEQRA procedures. Accordingly, because deficiencies in the lead agency designation process warrant restarting the entire SEQRA process, *see Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149 (4th Dep't 1992); *Matter of City of Schenectady v Flacke*, 100 A.D.2d 349 (3d Dep't 1984), the SEQRA review did not meet the literal compliance standard, so the Approvals should be annulled.

C. The SEQRA Review Relied on Unlawful Segmentation.

Petitioners in their opening Memorandum pointed out that the State Respondents engaged in impermissible segmentation by failing to assess the environmental impacts related to redevelopment of the former I-81 site, as well as those related to the 250 or more sites potentially contaminated by petroleum or hazardous wastes which will be disturbed by the Project. Initially, the State makes the rather astounding claim that the NYSDOT Regulations somehow allow them

[3] References to the Administrative Record are in the format "A.R." followed by Document No., and then either Page No. or Appendix Letter (as applicable).

to engage in segmentation. State Mem. at 23. As established in Subsection (b) above, though NYSDOT is able to promulgate its own SEQRA regulations, those regulations "are designed to be no less protective of the environment than [the NYSDEC Regulations]." 17 N.Y.C.R.R. § 15.1(d). Accordingly, NYSDOT is entirely without authority to grant itself the power to perform segmented SEQRA review. This creative regulatory argument is the only distinction the State offers for all of Petitioners' cited case law on this point other than *Westbury*. Though the State Respondents indicate that their Memorandum contained a distinction from *Westbury*, they do nothing more than restate the holding in *Westbury*, then summarily conclude that they did not engage in segmentation, ignoring Petitioners' arguments entirely.

Next, the State Respondents appear to mistake Petitioners' arguments, claiming that Petitioners alleged that segmentation occurred due to a failure to consider a City of Syracuse rezoning project entitled "ReZone Syracuse." State Mem. at 24. This was not what Petitioners argued at all. Rather, Petitioners pointed out that the State Respondents failed to review the specific development of the 10 to 12.5 acres of land that would allegedly be created *as a result of the Project*. As the ROD specifically recognized, the Project "may result in 10 to 12.5 acres of surplus transportation right-of-way, depending on how much land will be needed to accommodate the highway, sidewalk, shared use path, and other transportation features. NYSDOT will determine the size and location of the parcels once construction is complete." *See* A.R. 349 at 11. The redevelopment of this new land will take place after implementation of the Project, yet the State performed *no* environmental review related to that redevelopment. This is classic segmentation. *See e.g. Kirk-Astor Drive Neighborhood Ass'n. v. Town Board of Town of Pittsford,* 106 A.D.2d 868, 869 (4th Dep't 1984) (SEQRA review of rezoning proposal also had to consider impacts of the proposed office park planned for the land); *Taxpayers Opposed to Floodmart,* , 212

A.D.2d at 958 (environmental review of a proposed annexation had to consider a Wal-Mart proposed for the land).

The State's answer seems to be to disavow its own FEIS findings that there is a likelihood of 250+ brownfields sites, or that 10 to 12.5 acres of vacant land will be redeveloped. As stated in greater detail in the accompanying Affirmation of Linda Shaw, the State Respondents failed to properly review impacts related to the these brownfields which will be impacted by the Project. As the Fourth Department held in *Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester*, 150 A.D.3d 1678, 1680 (4th Dep't 2017), the failure to analyze the impact a project may have on contaminated properties is a violation of SEQRA. ("Here, despite the undisputed presence of preexisting soil contamination on the project site, the negative declaration set forth no findings whatsoever with respect to that contamination.").

In an attempt to save this deficient analysis, the State claims "further the federal EIS actually considered the possibility of discovering such sites during construction and noted that, in the event that any such sites are discovered, NYSDOT and its contractors would be required to comply with their legal obligations under ECL article 27, title 13." State Mem. at 25. However, the Fourth Department in *Rochester Eastside Residents* specifically held that this is not enough, stating "contrary to respondents' contention, the developer's promise to remediate the contamination before proceeding with construction did not absolve the lead agency from its obligations under SEQRA." *Rochester Eastside Residents*, 150 A.D.3d at 1680. *See also Penfield Panorama Area Community, Inc.*, 253 A.D.2d at 342 (EIS set aside due to the board's failure to consider the clean-up of hazardous waste on development site). They cannot just kick the can down the road.

Further, the assertion by the State that it will assess brownfields "in the event that any such sites are discovered" is perplexing. The State's own documentation establishes the existence of the 250+ sites. *See* A.R. 119, Appendix L. Regardless, the State Respondents take too narrow a view of SEQRA in arguing that it did not engage in impermissible segmentation, claiming Petitioners' arguments are "speculative." An EIS must assess "environmental impacts which can be *reasonably anticipated.*" ECL § 8-0109(2) [emphasis added].

As the Third Department recognized in *Defreestville Area Neighborhoods Ass'n, Inc. v. Town Bd. of Town of N. Greenbush*, 299 A.D.2d 631, 634 (3d Dep't 2002), the lead agency must "evaluate all reasonably anticipated impacts" of the project and must "consider[] the impact of measures likely to be undertaken as a result" of the project. Here, NYSDOT has acknowledged that the Project may impact 250+ contaminated sites, and also that it will create 10 to 12.5 acres of surplus land, but has failed to analyze the environmental impacts of disturbance of that contamination, and of the redevelopment of the surplus land.

While Ms. Leslie claims that "there is no certainty" that the surplus land will be available, that would create too high a standard. As stated above, the standard for reviewing a potential adverse impact is not whether such impact is a "certainty" as Ms. Leslie seems to require (Leslie Aff. at ¶ 70), but whether the surplus land could be "reasonably anticipated." In contrast, the State is somehow willing to project (without any real basis) that a large share of the Viaduct traffic will travel around Syracuse on I-481 rather than through the Community Grid, which is not only uncertain, but doubtful. *See* A.R. 235 (FEIS Chapter 5) at 5-143-144.

"The EIS, the heart of SEQRA… is to be viewed as an environmental 'alarm bell' whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." *Matter of Town of Henrietta v. Department of Environmental Conservation*, 76 A.D.2d 215, 220 (4th Dep't 1980). This purpose would be entirely frustrated if the State were able to ignore "reasonably anticipated" impacts, including those related to the contaminated sites, and the surplus land. ECL § 8-0109(2). These omissions constitute clear segmentation, which is contrary to SEQRA. 6 N.Y.C.R.R. § 617.3(g)(1).

D. The State's Flawed Alternatives Analysis Ran Afoul of SEQRA's Substantive Mitigation Requirement.

SEQRA mandates that agencies "shall act and choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." ECL § 8-0109(1). This substantive statutory directive of SEQRA has become known as the "mitigation requirement." "The quest for this degree of mitigation is one of the fundamental objectives of the SEQR process." *In Re Pyramid Crossgates Co.* (DEC Comm'r Decision, Sept. 18, 1981). Thus SEQRA is not just a full disclosure statute, but rather it requires agencies to mitigate or avoid environmental impacts to the maximum extent practicable. *See Town of Henrietta*, 76 A.D.2d at 227.

Here, the SEQRA review failed to fully analyze a reasonable range of alternatives in order to avoid or minimize adverse environmental impacts, limiting the substantive alternatives analysis to the "No Build Alternative," and two actual Project Alternatives - a new Viaduct Alternative, and the selected Community Grid Alternative. A.R. 349 (ROD) at 20. The failure to properly consider alternative designs has been held to be a reason to annul SEQRA determinations. *Grape Hollow Residents' Ass'n v. Beekman Planning Bd.*, No. 1986/284 (Sup. Ct. Dutchess Co. 1986).

See also County of Orange v. Village of Kiryas Joel, 2005 N.Y. Slip Op. 52270U (Sup. Ct. Orange Co. 2005) (annulling SEQRA determination where EIS failed to adequately explain alternatives analysis). Respondents declined to address this argument, which militates annulment of the Approvals.

Rather, by disqualifying potential reasonable alternatives due to minor inconsistencies with predetermined "Project Objectives" or "Needs," the State violated the basic mandate of SEQRA under ECL § 8-0109(8), since these alternatives might result in avoidance or minimization of negative impacts. For example, the FEIS summarily dismissed the V-5 New Stacked Viaduct Concept because it would cut off east/west access through East Genesee Street where it crosses Almond Street, which was contrary to the goal to "maintain or enhance the pedestrian, vehicular, and bicycle connections in the local street network within and near Downtown Syracuse to allow for connectivity between neighborhoods, business districts and other key destinations." A.R. 233 (FEIS Chapter 3) at 3-3, 3-8. So as a result, the State Respondents chose the Community Grid Only Alternative, which will put at least 40,000 vehicles on neighborhood streets, including 53-foot tractor trailers, exposing the community to air pollution, noise, traffic congestion, and safety hazards and actually cut off Petitioner Garland and other Southside residents' access to University Hill, *see* Garland Affidavit ¶¶ 2, 38-43, 55-57, impact 1,050 acres of ecological communities, FEIS at 6-504, and destroy potential habitat of both the endangered Indiana bat, and the Northern long-eared bat (which on November 30, 2022 was reclassified as "endangered" under the Endangered Species Act, *see* 87 FR 73488). *See* Table 6-4-8-6, FEIS at 6-451.

Adherence to these artificial constraints, which were more "honored in the breach than the observance," *Hamlet* act 1, scene 4, rather than making adjustments to avoid impacts, was a clear violation of SEQRA's substantive mandate under ECL § 8-0109(8).

E. The EIS Relied on Incorrect Data and Illogical Reasoning.

As Petitioners pointed out in multiple points of their opening Memorandum, the facts upon which the State premised their traffic analysis were flawed in numerous respects. Though the State Respondents purport to explain away these deficiencies in their response papers, they fail to do so. *See* Garland Affidavit ¶¶ 39-42. The courts have made it clear that a board decision is arbitrary and capricious if it is not "supported by substantial evidence." *Village of Honeoye Falls v. Town of Mendon Zoning Bd. of Appeals*, 237 A.D.2d 929, 930 (4th Dep't 1997); *see also Matter of Wilcox v Zoning Bd. of Appeals of City of Yonkers*, 17 N.Y.2d 249 (1966); *Farrell v. Johnson*, 266 A.D.2d 873 (4th Dep't 1999); *Kontogiannis v. Fritts*, 131 A.D.2d 944 (3d Dep't 1987).

Exacerbating the deficiencies in the traffic analysis is the fact that the State did not meaningfully attempt to determine the actual peak traffic period for the Project. The fact that they declined entirely to address the traffic conditions occasioned by Syracuse University football and basketball games and concerts held at the JMA Wireless Dome evinces a clear oversight in the traffic analysis, the same deficiency rejected by the Fourth Department in *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222 (4th Dep't 1979). Because the failure to properly address traffic concerns routinely requires reversal of SEQRA determinations, the ROD and SEQRA Review should be annulled here. *See e.g. Dries v. Town Bd. of Riverhead*, 305 A.D.2d 595 (2d Dep't 2003); *Akpan v Koch*, 75 N.Y.2d 561, 571 (1990).

F. The EIS Failed to Review Important Central Dangers.

As the Court of Appeals held in *Bronx Committee for Toxic Free Schools v. New York City School Const. Authority*, 20 N.Y.3d 148, 156 (2012), while an agency is entitled to a degree of deference in identifying areas of environmental concern, where an area is "too important" not to be reviewed under SEQRA, its omission warrants annulment of the agency determination. *See*

also Rochester Eastside Residents for Appropriate Dev., Inc. v. City of Rochester, 150 A.D.3d 1678, 1680 (4th Dep't 2017). Here, the State declined entirely to perform a carbon monoxide study to assess CO impacts on neighborhood residents, and determined that "a microscale air quality analysis for CO is not warranted." A.R. 246 (FEIS Ch. 6) at 6-258.

That the State would determine no such study is necessary despite the fact that the Project involves the rerouting of more than 40,000 additional vehicles per day onto local neighborhood streets (Petition ¶ 103) is relatively astounding (without considering impacts from the Micron Project), especially given the length of time the environmental review took. Petitioners submit that the impact of the rerouted traffic on the air quality in the City neighborhoods affected is perhaps *the* most significant impact of this Project for study. Though the State Respondents purport to have analyzed this issue, nothing short of a formal CO study should be accepted, given the serious nature of the possible impacts. As was the case in *Bronx Committee for Toxic Free Schools*, this glaring omission from the SEQRA review should require annulment of the Approvals.

POINT TWO

THE APPROVALS VIOLATED THE GREEN AMENDMENT

The State Respondents impermissibly and incorrectly interpret the Green Amendment by conducting statutory analysis through the lens of omission. They contend that because there is no language within the Green Amendment to include a right to procedural review of State action, none exists and Petitioners may only bring forward a Green Amendment claim based on "concrete, measurable environmental injuries." State Mem. at 43. This interpretation by omission runs afoul of accepted constitutional canons of interpretation.

It is the general rule of statutory construction that when the language of the law is clear, without ambiguity, a Court may not supply perceived omissions in the statute without transcending the judicial function. *Williams v. State*, 136 Misc. 2d 438, 441 (N.Y. Ct. Cl. 1987), *aff'd as modified*, 137 A.D.2d 277 (3d Dep't 1988). Instead, a reviewing Court should focus on the "express terms" of the amendment, and not stray from plain language. *Kuhn v. Curran*, 294 N.Y. 207, 213 (1945) ("Where the wording of the statute and the intent and purpose of the Legislature is clear and unambiguous, the courts are not privileged to lightly ignore its evaluation of the effect of the legislation and to interpose contrary views of what the public need demands"); *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) ("If the language is clear and unambiguous, the courts must follow the plain meaning of the statute."). The express language of Article I § 19 enshrines an affirmative, positive right for every New Yorker to have, "clean air and water, and a healthful environment." New York Constitution Art. I § 19. The New York State Constitution is a positive source of law, strengthening the underlying Federal laws, and not merely a set of limitations on government. *Brown v. State*, 89 N.Y.2d 172, 187-89 (1996). Therefore, if a government decision will negatively impact the healthful environment owed to the People, this Court should find these rights are worthy of protection.

Respondents cite no authority supporting their narrow interpretation of the Green Amendment, which is now enshrined in the New York Bill of Rights. In fact, these arguments run contrary to the first judicial opinion interpreting the Green Amendment, which was recently handed down by Monroe County Supreme Court Justice Ark. In *Fresh Air for the Eastside v. The State of New York et al.,* Supreme Court Monroe County adopted a broader judicial interpretation of the Green Amendment:

> The regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right. By the plain meaning of its very simple terms, the newly enacted 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. *Fresh Air for the Eastside v. The State of New York et al.* E2022000699, at 9 (Sup. Ct. Monroe Co. 2022) (attached to this Memorandum as **Appendix "A"**).

The State Respondents are not better suited to interpreting constitutional questions than the Courts. "[State agencies have] not been granted authority to make Constitutional determinations and [are] not better suited than this Court to determine whether a Constitutional violation has occurred." *Fresh Air for the Eastside*, E2022000699 at 15 (2022). State agencies must not act beyond the powers granted to them by the Legislature. *New York Const. Materials Ass'n, Inc. v. NYSDEC,* 83 A.D.3d 1323 (3d Dep't 2011). The State Respondents additionally argue that because both NEPA and SEQRA review have occurred and are supposedly protective of the environment, no Green Amendment rights will be violated. This analysis is flawed because the SEQRA review was legally insufficient. But in any event, this reasoning relies upon an outdated framework.

Since the Green Amendment came into effect on January 1, 2022, a new paradigm of environmental law exists. The mechanisms provided for in preexisting statutory schemes obviously do not render the Green Amendment irrelevant. Otherwise there would have been no reason to enact the Green Amendment in the first place. Complying with the Constitution is not optional for a state agency and is thus nondiscretionary and ministerial. *D.J.C.V. v. USA*, 2022 WL 1912254 at 16 (S.D.N.Y. 2022); *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 24 N.Y.2d 647, 655 (1969); *US v. City of Yonkers*, 96 F.3d 600, 622 (2d Cir. 1996). Rather, governmental decisions must undergo Constitutional scrutiny which was not in place prior to the enactment of the Green Amendment. As was the case in *Fresh Air for the Eastside*, the Court should not allow the New York State Attorney General to minimize the Green Amendment to the point of irrelevance.

POINT THREE

THE STATE RESPONDENTS VIOLATED CLCPA

The State argues in its Memorandum that NYSDOT performed an appropriate analysis and found there would be a decrease in carbon emissions, so no detailed statement of justification for the Project was necessary under the Climate Leadership and Community Protection Act ("CLCPA") (Laws of 2019, Chapter 106).[4] This is incorrect. The determination of whether an action will be inconsistent or interfere with the CLCPA's mandated goals must avoid speculation, and must be supported by data. *Matter of Danskammer Energy LLC v. New York State Department of Environment Conservation,* 208 Misc. 3d 196 (Sup. Ct. Orange Co. 2022). The chosen methodology of traffic analysis simply does not make sense and relies on speculative efficiency improvements that do not currently exist, or transition to electric vehicles that will happen whether the Project happens or not, so CLCPA's mandates were not met.

In calculating the changes in GHG emissions and energy use NYSDOT purported to analyze two items: (1) decreases in overall fleet-wide average emissions per vehicle-mile over time as engine technology and efficiency improve; and (2) increases in traffic volume due to growth. A.R. 247 at 6-280. Additionally, NYSDOT attempts to support its VMT calculations by stating the Project is going to shift traffic to "different roadway types resulting in vehicle speed changes and would decrease VMT overall." *Id.* Essentially, the agency's calculations appear to be premised on the re-routing of traffic, which will still occur, to the other roadways, and omits the related carbon contributions. It also ignores the fact that the traffic will arrive at its original destinations via stop-and-go routes, increasing pollution and accidents. Regardless, the engine

[4] CLCPA is only partially codified as ECL Article 75, and citations are generally to the sections set forth in the Session Laws of 2019 as Chapter 106).

technology improvements and efficiency changes are akin to what was discussed in *Danskammer*, where proposed higher efficiency turbines were not approved because of the speculative nature of the carbon emissions analysis.

CLCPA was designed to spur New York into action. The ambitious legislation enacted quantitative, enforceable metrics for the State to battle climate change. The CLCPA is an express acknowledgement that "climate change is adversely affecting [the] economic well-being, public health, natural resources, and the environment of New York." CLCPA § 1. CLCPA recognizes the devastating impacts such as severe and frequent extreme weather events, rising sea levels, declining amounts of freshwater and saltwater fish populations, an increase in average temperatures, exacerbation of air pollution, and increasing incidences of infectious diseases. *Id*. Per the CLCPA, it is the mandated goal of New York to "reduce greenhouse gas emissions from all anthropogenic sources 100% over 1990 levels by the year 2050, with an incremental target of at least a 40 percent reduction in climate pollution by the year 2030." CLCPA § 1(4).

The Project at issue in this case is one of the largest infrastructure projects in recent State history. The Community Grid Alternative is estimated to cost roughly $2.25 billion dollars, take at least six years for construction, and require the acquisition of 151 properties totaling 20.41 acres. *See* A.R. 230 at S-31, A.R. 234 at 4-1, and A.R. 241 at 6-135. It would be arbitrary and capricious for the State to progress with such a massive project, with clear greenhouse gas and carbon emissions, without promulgating regulations required by the CLCPA. Such action would be tantamount to a constructive nullification of the CLCPA, because if the I-81 Project is not required to be compliant with NYSDOT CLCPA regulations, what future project could ever be considered significant enough to require regulation?

While the State Respondents correctly point out the CLCPA implements a complex mechanism to fight climate change, they attempt to undercut the law by arguing that, while they are authorized to act, they are not bound by any specific statutory deadline. This is contrary to the spirit of the law. CLCPA § 8 mandates that the DOT, and other State agencies, "shall promulgate regulations to contribute to achieving the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law." CLCPA § 8.

NYSDOT's response begs the question, if not now, when? If NYSDOT considers it appropriate to undertake one of the largest infrastructure projects in Upstate New York in recent history without promulgating the mandated CLCPA regulations, NYSDOT is essentially saying it is under no obligation to comply with CLCPA's explicit instructions. The Court should not allow NYSDOT to nullify the CLCPA by this willful nonaction.

POINT FOUR

THE TOWNS HAVE CAPACITY TO SUE UNDER THE SMART GROWTH ACT

The State Respondents claim the Town Petitioners have no capacity to sue under the Smart Growth Act, based on the general principle that municipalities, "as subdivisions of the state, cannot contest the actions of the state which affect them in their governmental capacity or as representatives of their inhabitants.'" *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 A.D.3d 756, 758 (3d Dep't 2011). However, "[a]n express grant of authority is not always necessary. Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity, 'provided, of course, that there is no clear legislative intent negating review.'" *Town of Riverhead v. New York State Bd. of Real Prop. Servs.*, 5 N.Y.3d 36, 42 (2005).

By ECL § 6-0111 only forbidding a private right of action, but not negating the right of municipalities to sue, it impliedly gave the right to sue to the Towns, which are integrally involved in Smart Growth issues. Further, the Towns of Salina and DeWitt have implied capacity to maintain this suit to protect their interest under SEQRA, since they were named as "participating agencies" in the environmental review process (*see* A.R. 376, 379), but were illegally omitted, as involved agencies in the lead agency designation process, so they have capacity to address the deficient SEQRA review. *See* Point One B, *infra*.

Also, an exception applies "where the State statute impinges upon 'Home Rule' powers of a municipality constitutionally guaranteed under article IX of the State Constitution.'" *City of New York v. State*, 86 N.Y.2d 286, 291-92 (1995) [internal citations removed]. While the State claims that this exception must be pleaded, they fail to cite any authority for that proposition. NYSDOT is presumably claiming exemption from the Towns' zoning laws to construct the Project without obtaining necessary variances and permits, that still impinges on home rule. *See County of Monroe v. City of Rochester*, 72 N.Y.2d 338 (1988).

Nonetheless, even if the Towns lack capacity to sue under the Smart Growth Act, the requirements of the law are still relevant to the SEQRA Review, as well as the claims under the Green Amendment and CLCPA. The State Respondents merely did a cursory review of the Act's requirements by filling out a checklist. *See* A.R. 281 (FEIS Appendix D-3). But the limited findings in that form ignored the negative Smart Growth impacts of the Community Grid, which will direct traffic the suburbs and encourage development along the expanded former I-481, contrary to ECL § 6-0107(2)(b), and create heavy traffic and air pollution in neighborhood streets in the City while increasing GHG emissions.

POINT FIVE

FHWA IS NOT A NECESSARY PARTY

A. The Law of the Case Doctrine Bars This Issue From Being Relitigated.

This Court has already held that the FHWA is not a necessary party. Therefore, the law of the case doctrine applies, and Respondents should not relitigate this issue. It is well established that "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned[.]" *See Strujan v. Glencord Bldg. Corp.*, 137 A.D.3d 1252, 1253 (2d Dep't 2016). "The doctrine applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" and "operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law[.]" *Id.* [internal quotation and citations omitted]. According to the Court of Appeals, the law of the case doctrine "contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" and that "this practical protocol presupposes that legal determinations of a merits nature have been made or are necessarily implicated." *See People v. Bilsky*, 95 N.Y.2d 172, 175 (2000).

The State Respondents claimed in earlier briefing that Petitioners failed to obtain jurisdiction over FWHA, which they contend is a necessary party. Dkt. No. 27 at 5-6. After considering this argument, the Court granted a Temporary Stay and Restraining Order on November 10, 2022. Importantly, this Court's Decision and Order specifically held that "release of FHWA is proper and that FHWA is not a necessary party to Petitioners' State law claims[.]" *See* Dkt. No. 33 at 4. Therefore the law of the case should apply, and Respondents should be foreclosed from reraising a determined issue.

B. The FHWA Is Not a Necessary Party Under CPLR § 1001(a).

Even if the Court does not employ the law of the case doctrine and reexamines this issue, Respondents' arguments still fail. This exact issue has already been addressed in *Bronfman v. Flacke*, 127 A.D.2d 833 (2d Dep't 1987). There, the Second Department heard a challenge filed against the New York State Department of Environmental Conservation ("NYSDEC"), which approved an EIS prepared under the National Environmental Policy Act ("NEPA") by the United States Department of Agriculture. The court held: [t]he claim that this court may not review the sufficiency of the EIS is without merit... The DEC Commissioner's and this court's review of the EIS is predicated upon the obligations of State law, and **does not involve the prohibited review of the determination of a federal agency** by a state agency or court." *Id*. [emphasis added].

Here, as the Court previously determined, Petitioners are not challenging the determination of FHWA, so FHWA is not a necessary party.[5] Petitioners in this proceeding are challenging the conduct of a New York state agency under New York state law. In a separate lawsuit, Petitioners have challenged the conduct of a federal agency under federal law. This procedure was specifically approved in *Bronfman*, which Respondents have declined to distinguish for the second time. Indeed, Respondents have declined to even mention the holding in *Bronfman* despite Petitioners' repeated citations to that case on this point.

As was held in *Bronfman*, the involvement of federal entities and related federal review does not act to divest this Court of its authority to hear state claims, or as Respondents would have it, put them in a "Catch-22" where state conduct is immune from judicial review. *See e.g. Natural Resources Defense Council v. City of New York,* 528 F. Supp. 1245, 1251 (S.D.N.Y. 1981) (*rev'd*

[5] Petitioners have in fact challenged the determinations of FHWA under Federal law in the United States District Court for the Northern District of New York, the proper venue for such a challenge.

on other grounds 685 F.2d 425 (2d Cir. 1982) (observing that, where a federal court has jurisdiction over an action to review compliance with NEPA, the same plaintiffs may maintain a simultaneous state court proceeding challenging lack of compliance with SEQRA for the same project)).

Plainly, FHWA is not a necessary party for this question premised specifically on state law, and "complete relief" can be granted without their participation, CPLR § 1001(a), so Petitioners did not oppose their dismissal. *See e.g. Nichols v. VanAmerongen*, 72 A.D.3d 1499 (4th Dep't 2010). But even if it were a necessary party, this matter could proceed under CPLR § 1001(b), as was the case in in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

FHWA has chosen not to participate in this litigation. It has willingly moved for dismissal. At the hearing before the Court where this dismissal was discussed, FHWA's counsel raised no concerns about prejudice it would face if this matter proceeded. Petitioners and the Court also afforded FHWA every opportunity to remain in this case as an interested party. FHWA was entirely aware that the propriety of conduct of the New York State Respondents under New York State law would be reviewed by the Court, but FHWA elected to remove itself. As was the case in *Saratoga County Chamber of Commerce*, this weighs heavily in favor of allowing the case to proceed. Respondents declined to address this central issue.

Accordingly, the law of the case doctrine bars relitigation of this issue, but if the Court does reexamine this question, because Respondents have declined entirely to address the controlling authority in *Bronfman*, Respondents' position should not be credited. In any event, the matter could proceed under CPLR § 1001(b) due to FHWA's willing decision not to participate.

CONCLUSION

Based on the above, Petitioners respectfully request that this Court grant their Petition and grant such other and further relief as the Court deems just and proper.

Dated: Rochester, New York
December 23, 2022

s/Alan J. Knauf
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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 the word count for this Memorandum of Law, inclusive of point headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block is **6,772**. In compliance with section 202.8-b(f), Petitioners have submitted a letter application for permission to exceed the limitations set forth in section 202.8-b(a).

Dated: December 23, 2022

s/Alan J. Knauf
ALAN J. KNAUF

APPENDIX A

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.

AMENDED DECISION and ORDER
Index No. E2022000699

Knauf Shaw LLP Linda R. Shaw, Esq., Alan J. Knauf, Esq., Dwight Kanyuck, Esq., William F. Kellermeyer, Esq. and Melissa Valle, Esq., of Counsel, Attorneys for Petitioner

Harris Beach PLLC, Kelly S. Foss, Esq. Steven P. Nonkes, Esq. Frank C. Pavia, Esq. Allison B. Fiut, Esq. of Counsel, Attorneys for Respondent Waste Management of New York, LLC

Letitia James Attorney General State of New York, Mihir A. Desai. Esq. Assistant Attorney General Attorney for defendants The State of New York and New York State Department of Environmental Conservation ("NYSDEC") (together "the State").

Heisman Nunes and Hull LLP Ronald G. Hull, Esq. of Counsel, Attorneys for Defendant The City of New York

ARK, J.

PRELIMINARY STATEMENT

The "Members" of **Plaintiff Fresh Air for the Eastside, Inc.**[1] ("FAFE" or "Plaintiff") are residents in the Town of Perinton, New York, who claim their recently acquired constitutional "right[s] to clean air and water and a healthful environment"are being violated as a result of the actions or inactions on the part of the Defendants regarding the High Acres Landfill [2] ("the Landfill") in the adjacent Towns of Perinton and Macedon, New York.

[1]To date, none of the Defendants has raised the issue whether a corporation has standing as a "person" to invoke a constitutional right to clean air and a healthy environment

[2] The over 300-acre Landfill, bordering Monroe and Wayne counties in the Finger Lakes Region, is the second-largest landfill in New York State and has the largest remaining capacity for disposal of Municipal Solid Waste ("MSW") of any landfill in New York State (47,761,354 cubic yards of air space of remaining capacity with an estimated 29 years and 4 months of remaining life) and receives the second highest quantity of waste in the State at this time.

The Green Amendment.

FAFE brings this action pursuant to the newly enacted Section 19 of Article I of the New York Constitution (the "Green Amendment" or the "ERA") which guarantees, as of January 1, 2022, "[e]ach person shall have a right to clean air and water, and a healthful environment."

On November 2, 2021, New York State voters overwhelmingly passed[3] a ballot measure adding the Green Amendment to the State Constitution. It was approved at a 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 New York State Department of Environmental Conservation ("NYSDEC") with the purpose to "conserve, improve and protect [New York's] natural resources and environment." (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 the 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 Parties.

The **Defendant Waste Management of New York, L.L.C.** ("WMNY")[4] owns and operates the Landfill, which accepts and disposes of mostly Municipal Solid Waste ("MSW") generated by the Defendant City of New York ("NYC") and transported to the Landfill via rail.

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[3]

Votes in:	Yes	No	Blank	Void	Total	Yes % of Total
Perinton	9,209	3,988	398		13,595	67.7
Monroe County	94,871	44,065	6,761	24	145,721	65.1
Total NYC	754,132	157,665	237,375	0	1,149,172	65.6
Statewide	2,129,051	907,159	404,006	894	3,441,110	61.9

[4] WMNY is a Delaware limited liability company authorized to do business in New York, with offices located at 425 Perinton Parkway, in the Town of Perinton, County of Monroe and State of New York.

Defendants the State of New York and the New York State Department of Environmental Conservation ("NYSDEC") together are **"the State".** Defendant NYSDEC is a governmental agency created on April 22, 1970 under the laws of the State of New York and was delegated the authority to protect and enhance the environment within the State of New York. NYSDEC is charged with the oversight, monitoring, and enforcement of laws and regulations related to the environment in New York State, including generation, transport, and disposal of solid waste, and air emissions. The State, and in particular NYSDEC, has an affirmative duty to all the citizens of New York to protect the environment.

NYSDEC states that its mission is to "conserve, improve and protect New York's natural resources and environment to prevent, abate, and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being." NYSDEC is responsible for regulatory oversight and operating permit enforcement of the Landfill. NYSDEC regulations, at 6 N.Y.C.R.R. § 360.19(i), require that a landfill "must ensure that odors are effectively controlled so that they do not constitute a nuisance as determined by [NYSDEC]."

Defendant New York City ("NYC") is a municipal corporation created and existing under the laws of the State of New York. NYC is responsible for the collection, transport, and disposal of MSW generated in NYC, including the NYC garbage. NYC has contracted with WMNY to collect, transport, and dispose of NYC garbage. The contracts provide that should WMNY fail to comply with any laws, and create any impermissible odors or other adverse environmental effects, then a breach of the contracts has occurred. NYC can then enforce the breach and therefore abate the impermissible odors or other adverse environmental effects.

Plaintiff's Complaint.

Plaintiff complains that 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 under the Green Amendment to clean air and a healthful environment, to wit:

> The current and future liability of the Defendants arise each in part from their continued aggregate, cumulative actions and failures to live up to the statutory goals and

policies of reducing the amount of waste disposed, which would reduce greenhouse gasses (" GHGs"). See Complaint ¶ 165.

Defendants have already caused and continue to cause harm to the natural environmental systems critical to the Members and all citizens of New York and are causing Members and the surrounding community to breathe unhealthy air. See Compl. ¶ 154.

The attempts by Defendants to mitigate the Odors and Fugitive Emissions are wholly inadequate to preserve a habitable climate and healthful environment. See Compl. ¶ 162.

By allowing repeated permit and regulatory violations at the Landfill and delaying actions to drastically cut GHG emissions, the State is acting contrary to its mission and contributes to the cumulative impact of climate change, which will affect the health and well-being of the Members. This failure breaches the agency's basic duty to care for the Members and their environment. See Compl. ¶ 156.

NYSDEC has authorized and permitted activities that emit vast quantities of GHGs into the atmosphere, further contributing to the global impact of climate change and the destruction of a habitable climate. See Compl. ¶ 157.

The State has failed to adequately use its enforcement powers to cause WMNY to control the Odors and Fugitive Emissions at the Landfill. See Compl. ¶ 163.

NYC has failed to abate the harmful environmental conditions caused by WMNY related to the Odors and Fugitive Emissions, which is an abdication of its duty under the New York City Charter to ensure the proper disposal of NYC Garbage which it can enforce through the NYC contract with WMNY to prevent Community impacts. See Compl. ¶ 159.

By NYC failing to implement a long-term plan to reduce, recycle and reuse its garbage, NYC is acting contrary to its own sustainability goals since it is exporting most of the NYC Garbage to methane emitting landfills. See Compl. ¶ 160.

NYC has also failed to properly incentivize recycling within the five boroughs of NYC, and instead prefers to simply ship NYC garbage to the Landfill and other landfills

in Central and Western New York. See Compl. ¶ 161.

The continued permitted expansion and operation of this mega-landfill is contrary to New York statutory policy, including both the New York Solid Waste Hierarchy set forth in Environmental Conservation Law ("ECL") §27-0106, which makes landfilling the solid waste management strategy the least preferred option, in the "interest of public health, safety and welfare and in order to conserve energy and natural resources." The New York Climate Leadership Community Protection Act ("CLCPA") set forth at ECL Article 75, makes reduction of GHG the goal of the State.

The State and NYSDEC have failed to enforce applicable laws, regulations and permits applicable to the Landfill, which should be applied to prevent or reduce the Fugitive Emissions and Odors.

Requested Relief.

As a result, the Defendants are each violating the FAFE Members' constitutionally protected rights to "clean air …and a healthful environment." See Compl. ¶ 166.

By reason of this constitutional violation, this Court should issue an injunction directing the immediate proper closure of the Landfill. See Compl. ¶ 167.

Alternatively, this Court should enjoin Defendants to immediately abate the Odors and Fugitive Emissions in the Community by, at a minimum, installing a permanent cover as defined in the 6 NYCRR Part 360 regulations on all the side slopes of the Landfill Cells 1-11 not being actively landfilled in Perinton, and daily SEM monitoring of the entire surface of the Landfill, to ensure a substantial reduction in Fugitive Emissions and negative air quality impacts. See Compl. ¶ 168.

Accordingly, Plaintiff requests this Court award the following relief:

(1) declare the Defendants are violating Plaintiff's Members' 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.

Facts as set forth by Petitioner.[5]

A. The Landfill.

The Landfill is located at 425 Perinton Parkway in the Town of Perinton, Monroe County, and in the adjacent Town of Macedon, Wayne County, in the State of New York. 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.

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. When the rail transportation of waste from NYC commenced in about 2015, serious problems began. 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"). The Landfill Permit expires on July 8, 2023, and the Air Permit expired on December 1, 2021.[6]

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[5] 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).

[6] On March 10, 2022, Petitioner requested by an Amended Petition (See, *Fresh Air for the Eastside, Inc. vs. Town of Perinton, Town of Perinton Zoning Board of Appeals, and Waste Management of New York, L.l.C.*, Index No. E2021008617) various actions taken by the Town of Perinton, Town of Perinton Zoning Board of Appeals, and WMNY be vacated, annulled and/or declared illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void. Included in the Amended Petition are challenges to the Town-issued Special Use Permit and the Host Community Agreement between the Town and Waste Management. As set forth in *Fresh Air for the Eastside, Inc. vs. Town of Perinton, Town of Perinton Zoning Board of Appeals, and Waste Management of New York, L.l.C.*, Index No. E2021008617 at pages 8 and 9:

> "Until the Green Amendment on January 1, 2022, a person's recourse against air quality nuisance at High Acres Landfill was either to challenge the various, including local, permitting process or to complain, mainly to NYSDEC. The Perinton land use

boards' determinations, which through their approval processes are to consider and balance community concerns and permit appropriateness, stand unless arbitrary, capricious or violative of law. However, whether a governmental action was arbitrary and capricious may not be the standard for adjudicating constitutional rights. The standard for review of agency statutory actions `which impact individual rights, being arbitrary and capricious, puts the burden of proof on the complainant. Only if the challenged statutory government action is arbitrary and capricious does the individual have a remedy. However, constitutional inquiries of governmental action are more rigorous. For example, the prosecution must establish 'beyond a reasonable doubt' that a criminal defendant's statement was lawfully obtained (see, *People v. Rosa,* 65 N.Y. 2d 380 [1985]). The standard is not whether the police action was 'arbitrary and capricious or an abuse of discretion', but whether it can be established 'beyond a reasonable doubt' that the police action did not violate the defendant's constitutional rights.

"In adjudicating and applying the Green Amendment, it may be necessary to have a two prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'right to clean air and water, and a healthful environment' ? This new Green Amendment paradigm was alluded to at the January 2022 Annual Meeting of the New York State Bar Association *Environment and Energy Law Section.*

Auditing How Government Respects Environmental Rights:

"These self-executing rights are to be observed and respected by all branches of New York State government, including local governments, public authorities. Now that the amendment has become a fundamental right, it is incumbent on all government entities to determine if they are respecting this right. They should be proactive, and not ignore their obligations. Governmental entities should assess if their on-going programs or activities respect these rights, and where short-comings may be found, they can provide remedial measures to ensure that the environmental rights are not abridged.

Protecting Environmental Rights Now Guides All Governmental Environmental Duties.

1. All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person's environmental rights will be respected. Interpretation of statutes and regulations will now apply these environmental norms. The fundamental rights serve as a guide to agencies in interpreting their duties.

2. Where a person's rights to clean air and clean water and a healthful environment are compromised by action that had previously been permitted by a state agency or a local government, the fact that the conduct had been deemed 'legal' will not insulate it from judicial scrutiny and appropriate remedial orders by a court to give the environmental rights effect and ensure that the individual's rights are respected. There is no 'grandfathering' of actions previously permitted by government."

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. 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.

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. See Compl. ¶ 38. The Landfill's untreated Fugitive Emissions, which include at least 15% of the total Landfill Gas created by the Landfill, are well-documented. See Compl. ¶ 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. See Compl. ¶¶ 40, 41, 43. The methane present in the Fugitive Emissions is a potent greenhouse gas ("GHG") See Compl. ¶ 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. Compl. ¶ 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. Compl. ¶ 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.

Compl. ¶ 52. At least 99 of those complaints were made after January 1, 2022. Compl. ¶ 52. NYSDEC has logged at least 2,626 complaints of Odors and/or Fugitive Emissions. Compl. ¶ 55. The Odor and Fugitive Emissions are continuing in nature. Compl.¶ 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. Compl. ¶ 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. Compl. ¶ 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 (Compl. ¶¶ 63-68); the Landfill constantly exceeds its emission limits (Compl. ¶¶ 69-85); the Landfill is contributing to global climate change (Compl. ¶¶ 86-96); the Landfill and its emissions are contrary to the New York Climate Leadership Community Protection Act ("CLCPA") (Compl. ¶¶ 99-116); and the Landfill is contrary to the State's Solid Waste Hierarchy (Compl. ¶¶ 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.[7] Odors/Fugitive Emissions, which are causing unclean air and an unhealthful environment, persist (Compl. ¶ 57).

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[7]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").

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"). (Compl.¶¶ 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. (Compl. ¶¶ 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. (Compl. ¶ 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. (Compl. ¶ 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. (Compl. ¶ 35). The various contracts NYC has with WMNY demonstrate that NYC is not powerless, and is capable of abating the Odors and Fugitive Emissions. (Compl.¶ 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 environment has been violated.

The regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right. By the plain meaning of its very simple terms, the newly enacted 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.

Defendants' motions to dismiss the Complaint.

Motion #1: Defendant City of New York moves to Dismiss the Complaint pursuant to CPLR 3211 (a) (1), (a) (2), and/or (a) (7), and granting such other further relief as this Court deems just and proper.

Motion #2: Defendants the State of New York and the New York State Department of Environmental Conservation (the "State") move to dismiss the single cause of action pled herein, as against the State, because the Plaintiff's claim is time barred and because it fails to state a claim for the relief of mandamus to compel.

Motion #3: Defendant Waste Management of New York, L.L.C. moves to dismiss the Complaint pursuant to CPLR 3211 (a) (1), (a) (2), and/or (a) (7).

Plaintiff's Opposition.

Motion #3: WMNY's Motion to Dismiss.

Defendants WMNY (Motion #3) and NYC (Motion #1), but not the State, argue that the Green Amendment is not self-executing and cannot be enforced by a private party. FAFE counters that 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. 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 may deprive Members of their right to clean air and a healthful environment. Compl. ¶ 164.

In their memoranda of law, Defendants NYC and WMNY set forth the possible speculative effects the Green Amendment would have on private parties and the already regulated community should this new constitutional right be found to be self-executing and enforceable by a private cause of action by this Court. FAFE counters that 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 need not fear the Green Amendment. FAFE maintains that citizens may 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 asserts that its claims against each of the Defendants are valid and its complaint should not be dismissed.

These issues of whether the Green Amendment is self-executing and whether there can be direct action against private entities were cogently addressed in an article presented in the Albany Law School Govenment Law Center *Explainer* " **New York's New Constitutional Environmental Bill of Rights: Impact and Implications"** *Is the Green Amendment Self-Executing? by Scott Fein and Tyler Otterbein*:

> "The general rule is that constitutional provisions are presumptively self-executing. See *Brown v. State*, 89 N.Y.2d 172, 186 (1996) (*citing People v. Carroll,* 3 N.Y.2d 686 (1958)).[8] In contrast to the constitutional provisions... which explicitly reference further action by the legislature, there is no mention in the text of the Green Amendment of involvement of the legislature or legislative process as a predicate to implementation. Consequently, based on the plain text, it would seem that the Green Amendment is enforceable without additional legislation...
>
> The Amendment allows enforcement against the government, this much is unambiguous. It appears less likely that the courts will allow an action to prevent pollution to be brought directly against private entities under the Green Amendment. A comparison with several other provisions of the New York State Constitution informs this view. Article I, Section 11 provides that "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 any firm, corporation, or institution*, or by the state or any agency or subdivision of the state." (Emphasis added). In contrast, Article I, section 3, pertaining to the free exercise of religion, and Article I, section 8, protecting freedom of the press, make no reference to private entities and, with certain limited exceptions, have been found to impose a restriction only on the government."

This Court agrees with this analysis that the Green Amendment makes no reference to

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[8] *Brown v. State*, 89 N.Y.2d 172, 186 (1996). A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing, that is, it takes effect immediately, without the necessity for supplementary or enabling legislation (see generally, Friesen, State Constitutional Law ¶ 7.05 [1], quoting from Cooley, Constitutional Limitations [7th ed.]; 16 C.J.S., Constitutional Law, § 46). In New York, constitutional provisions are presumptively self-executing (see, *People v. Carroll*, 3 N.Y.2d 686, 691: "The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing". (16 C. J. S., Constitutional Law, p. 144, and cases there cited; see, also, 11 Am. Jur., Constitutional Law, § 75, p. 692.).

private entities and grants WMNY's Motion #3[9] dismissing the Complaint pursuant to CPLR 3211 (a) (7).

Motion #1: City of New York's Motion to Dismiss.

Garbage is fungible. New York City is merely a customer of WMNY who's garbage would be replaced at the High Acres Landfill with that of a different WMNY customer. New York City has no duty to the Plaintiff or its Members per the Green Amendment to police WMNY's compliance with its permits or to abate operational problems at WMNY's regulated and licensed landfill. Therefore, the City of New York's Motion to Dismiss the complaint against the City of New York for failure to state a cause of action is Granted..

Motion #2: The State of New York and the New York State Department of Environmental Conservation (together the "State") Motion to Dismiss.

Point 1. In this action for declaratory judgment and injunctive relief, the State moves for an Order dismissing the single cause of action pled herein, as against it, because of FAFE's claim is time barred and because it fails to state a claim for the relief of mandamus to compel. As detailed below, FAFE argues that the State's motion should be denied in its entirety because FAFE's lawsuit is procedurally proper, timely and it was unnecessary to first petition NYSDEC. Furthermore, the State lacks the discretion to violate the Constitution.

In its defense, the State lists the various changes it has caused WMNY to make at the Landfill. However, 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 members' constitutional rights to clean air and a healthful environment.

The State concedes DEC is authorized to enforce the Permits and that authority is subject to DEC's discretion. FAFE has alleged more than just the State's failure to enforce the

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[9] The landfill exists by the granting of governmental permits and regulation. This lawsuit may result in the closure of the landfill by court order and/or government action. One would think that WMNY would want to remain in the lawsuit to protect its interest. WMNY would certainly be a necessary party per CPLR § 1001. However, WMNY has removed itself from this lawsuit and may no longer have standing to challenge any action taken herein.

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 in Point Three below, the State lacks the discretion to violate the Constitution.

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. FAFE's Complaint was properly pursued as one for a declaratory judgment because the reliefs it seeks are not available through CPLR Article 78. 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). 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. 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).

FAFE is not challenging the issuance of the Permits. FAFE is seeking redress for actions, inactions and/or results that violate the Permits or which otherwise cause unclean air or an unhealthful environment, and thereby violate the Constitution. Thus, the State's reliance on CPLR § 7803(4) is inapplicable.

Quite simply, an Article 78 proceeding is best to review past actions of an agency. A declaratory judgment action is best to determine prospective responsibilities.

Point 2. Even if this action is converted to an Article 78 proceeding, FAFE's suit lies.

A. FAFE's Action Is Timely.

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 time-barred. "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 v. Cadman Towers, Inc.,* 136 A.D.3d 951, 952 (2d Dep't 2016). See also, *Bank of New York Mellon v. Craig,* 169 A.D.3d 627, 628 (2d Dep't 2019). Because no applicable statute of limitations barring FAFE's Complaint has been shown, the State has failed its burden to warrant dismissal of FAFE's Complaint pursuant to CPLR § 3211(a)(5). Again, FAFE's challenge is not to the issuance of the Permits, but to the State's daily actions or inactions resulting in the current and on-going violations at the Landfill which continuously emit Odors and Fugitive Emissions. These daily actions or inactions violate the constitutionally protected, affirmative rights of the Members to "clean air … and a healthful environment." Compl. ¶¶ 152, 153. More needs to be done to protect FAFE's constitutional right to clean air and a healthful environment. As set forth above in *Brown v State*, 89 NY2d 172, 186 [1996], New York courts will only imply a private right of action under the state constitution when protection is not available elsewhere.

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. Compl. ¶ 153. 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, whether this action is treated as one for declaratory judgment or lies under Article 78. Regardless, constitutional violations are subject to the six-year statute of limitations under CPLR § 213. Therefore, FAFE's claims are not timebarred. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

B. FAFE did not fail to exhaust administrative remedies.

The State suggests 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: 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. Indeed, any attempt by FAFE to exhaust its administrative remedies and first proceed pursuant to 6 NYCRR § 621.13 may well be inappropriate because of the constitutional question at stake. 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 New York's Bill of Rights, not the Environmental Conservation Law, and thus, this matter is within this Court's purview.

Point 3. The State lacks discretion to not comply with the Constitution.

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. 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. Contrary to the State's argument, it is unnecessary for the Green Amendment to "impose any mandatory duty on the State" because of the State's nondiscretionary obligation to comply with the Constitution. 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. *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. 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 Members' constitutional rights to clean air and a healthful environment. The Green Amendment is clear. The legislative history is interesting[10], but unnecessary 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). Thus, this Court is fully entitled to compel the State to comply with the Constitution.

For the reasons stated above, the State has not carried its burden on its Motion to Dismiss. FAFE has properly stated a cause of action. The State's Motion to Dismiss is denied.

Conclusion.

State and local governments have the most fundamental governmental responsibility to manage their constituents' refuse. NYS through its DEC issues permits and monitors local garbage transfer and disposition. New York State generally[11] and New York City specifically have the obligation to manage garbage generated in New York City.[12] WMNY provides an important service in facilitating those responsibilities through the transfer and disposition of refuse for a profit.

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[10] For example: "When Assembly member Mankeltow asked whether the Green Amendment would apply to the High Acres Landfill, after stating "the smell's been an issue. The landfill smell is an issue…It never seems to stop," Assemblymember Englebright responded, "yes, but for many of our citizens, they would look at the landfill such as the one you described which is harming people in the community and they would say, We have a right and our government is not living up to its obligation." Foss. Aff. Ex. 9, p.40-41 (Assemb. Mankeltow).

[11] Query: If a county and municipality did not take responsibility for waste management in a given community, would the responsibility default to the State? By analogy, if there is no local law enforcement, do the New York State Police take responsibility?

[12] The State disputes that it has "the obligation to manage garbage generated in New York City." Instead, the State posits that the DEC issues solid waste management facility permits and air emission permits to landfills that operate in the State, see ECL § 27-0707, 6 NYCRR Part 201, but is under no obligation to manage New York City waste or to assure that landfills are available for all municipal garbage generated in the State. See Footnote 11.

With no legal mandate or responsibility to do so, the Town of Perinton, nearly 350 miles northwest[13] of New York City, has taken upon itself to be a depository for New York City's garbage. By the granting of a Landfill Permit, the Perinton Town Board has chosen to accept the refuse of non- Perinton communities to the claimed, and apparent, detriment of hundreds of Perinton residents. Certainly, but for the issuance of Permits to WMNY by the Town of Perinton and the DEC, there would be no Landfill in Perinton and, of course, no violations of FAFE Members' recently acquired constitutional rights to clean air.

The disposition of NYC's garbage is understandably a greater concern for NYS and NYC than is the nuisance suffered by hundreds of homeowners in Perinton, New York. The DEC will go through its administrative rituals of monitoring the Landfill. However, the likelihood of the State, through its DEC, closing down a very significant landfill that rids NYC of millions of tons of garbage in deference to the malodorous suffering of a few hundred homeowners 350 miles away is minimal, if at all. Accordingly, the resolution of these issues may be up to the courts and/or the Perinton electorate.

The Town of Perinton is responsible for future Permits, which if denied, would necessitate the remediation of the then closed Landfill. Problem solved. WMNY would have to find other landfills for its customers', including New York City's, garbage. Since the Permit is issued by a majority vote of an elected town board, which also appoints the members of the land use boards, the decision to issue a permit is political.[14] Accordingly, it is the right of the voters in Perinton to affect the permit determination through the election of board members.[15]

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[13] The vast majority of operating landfills in New York State are in Central and Western New York State, hundreds of miles from NYC. High Acres Landfill is one of the largest and most active.

[14] Local officials possess a familiarity with local conditions necessary to make sensitive decisions affecting the development of their community; their decisions should not be supplanted by those of the court. See, *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

[15]The Perinton Town Board (Council) consists of five members and is the executive body that governs the town of 46,713. The four town council members serve 4 year terms. The supervisor serves a 2 year term. Two of the four council members are elected in alternating years. Thus every two years at least the supervisor and two council members (constituting a possible majority of the Board) are up for election. The permit is granted by at least a majority, i.e. three

Remarkably, the Perinton Town Board and its land use boards, which through their approval processes are to balance and consider community concerns and permit appropriateness, service and accommodate NYS and NYC to the apparent detriment of many Perinton residents..

Plaintiff has not included the the *sine qua non* of the claimed Green Amendment violations- the permitting of the Landfill by the Town of Perinton- in this lawsuit.[16] Even more simply: no Permit, then no Landfill, then no pollution, then no more violations of the Green Amendment. WMNY would then deposit NYC's garbage elsewhere. NYSDEC's final involvement would be to effect a proper remediation of the closed Landfill. Until such time, if ever, that the Perinton electorate affects the permitting process, FAFE will wage its David versus Goliath[17] legal battles to enforce its Green Amendment rights against the Defendants.

These lawsuits set forth the apparent failings of the existing regulatory processes and seek added redress through the Green Amendment. Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to act to prevent environmental harms is uncertain. Indeed, the vigor of the State's opposition to this lawsuit does not bode well for its enforcement of the Green Amendment.[18]

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votes of the Board. The next Perinton town election is November 7, 2023. In the November 2, 2021 town election, four candidates were competing for two council seats. The second place winning candidate received 90 more votes than the third place losing candidate. Comparatively, there were 9,209 votes in favor of the Green Amendment and 3,988 against, a difference of 5,221. As set forth in footnote 4 above, there was a slightly greater per cent of "yes" votes for the Green Amendment in Perinton than in Monroe County, NYC or NYS. Could an organized "Green" opposition to the permitting affect the election of sympathetic members to a town board?

[16] See footnote 7.

[17] 1 Samuel 17.

[18] Contrariwise, as set forth at the New York State Bar Association January 2022 Annual Meeting of the *Environment and Energy Law Section*:

The Impact of the Green Amendment - *A New Era of Environmental Jurisprudence* by Prof. Nicholas A. Robinson. Elisabeth Haub School of Law at Pace University:

"Protecting Environmental Rights Now Guides All Governmental Environmental Duties. 1. All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person's environmental rights will be respected. Interpretation of statutes and regulations will now apply these environmental norms. The

The Court has reviewed all of the Pleadings, Memoranda, Exhibits, Documents and Letters filed in this proceeding as set forth in attached COURT EXHIBIT 1. Accordingly, for the reasons set forth above, the Court Decides and Orders as follows:

Motion #1. The City of New York's Motion to Dismiss the complaint against the City of New York for failure to state a cause of action **is Granted**.

Motion #2. The State has not carried its burden on its Motion to Dismiss. FAFE has properly stated a cause of action. The State's Motion to Dismiss is **Denied**. The State's request for thirty (30) days from the date of notice of entry of this Decision and Order to serve and file a Verified Answer pursuant to CPLR § 7804(f) is **Granted**.

Motion #3. WMNY's Motion to Dismiss the Complaint pursuant to CPLR 3211 (a) (7) is **Granted.**

Any other requests for relief are Denied

SO ORDERED.

Dated: December 20, 2022
Rochester, New York

John J. Ark, J.S.C.

COURT EXHIBIT 1

Pleadings, Memoranda, Exhibits, Documents and Letters reviewed by the Court:

Doc #

2 COMPLAINT.
20 NOTICE OF MOTION City of New York's Motion to Dismiss
21 AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION
22 EXHIBIT(S) Complaint
23 MEMORANDUM OF LAW
25 NOTICE OF MOTION
26 AFFIDAVIT IN SUPPORT OF MOTION: Affidavit of Thomas P. Haley
27 EXHIBIT(S) Ex 1 - Landfill Permit
28 EXHIBIT(S) Ex 2 - O&M Manual

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fundamental rights serve as a guide to agencies in interpreting their duties."

29 EXHIBIT(S) Ex 3 - Air Permit
30 EXHIBIT(S) Ex 4 - Notice of Violation
31 EXHIBIT(S) Ex 5 - FAFE petition to modify permit
32 EXHIBIT(S) Ex 6 - DEC Response to FAFE petition
33 EXHIBIT(S) Ex 7 - FAFE Letter to DEC (August 10, 2021)
34 EXHIBIT(S) Ex 8 - DEC Response to FAFE Letter (August 25, 2021)
35 AFFIDAVIT IN SUPPORT OF MOTION: Affirmation of Mihir Desai
36 EXHIBIT(S) 2017 A6279 Sponsor Memo
37 EXHIBIT(S) 2018 A6279 Assembly Debate 2018-04-24
38 EXHIBIT(S) 2021 A1368 Assembly Debate 2021-02-08
40 MEMORANDUM OF LAW IN SUPPORT
41 NOTICE OF MOTION
42 AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION: K. Foss Affirmation
43 EXHIBIT(S) FAFE 2018 Petition
44 EXHIBIT(S) NYSDEC Response
45 EXHIBIT(S) NYSDEC Response Attachments
46 EXHIBIT(S) NYSDEC Letter
47 EXHIBIT(S) Assembly Debate 2017-04-24
48 EXHIBIT(S) Excerpts Assembly Env Comm 2017 Annual Report
49 EXHIBIT(S) Assembly Debate 2018-04-24
50 EXHIBIT(S) s2072 I2019
51 EXHIBIT(S) Assembly Debate 2019-04-30
52 EXHIBIT(S) s2072 I 2019 sponsor memo
53 EXHIBIT(S) Excerpt Assembly Env Comm 2019 Annual Report
54 EXHIBIT(S) s528 I 2021
55 EXHIBIT(S) Assembly Debate 2021-02-08
56 EXHIBIT(S) s528 I 2021 Sponsor Memo
57 EXHIBIT(S) Excerpt Assembly Env Comm 2021 Annual Report
58 EXHIBIT(S) Nov 2021 Vote Results
59 EXHIBIT(S) Complaint
60 MEMORANDUM OF LAW IN SUPPORT
61 NOTICE OF MOTION (AMENDED): Amended Notice of Motion by the State
64 LETTER/CORRESPONDENCE - SO ORDERED
65 MEMORANDUM OF LAW IN OPPOSITION
66 MEMORANDUM OF LAW IN OPPOSITION
67 MEMORANDUM OF LAW IN OPPOSITION

68 AFFIDAVIT IN OPPOSITION TO MOTION: Aff. in Opp. to Motions 1, 2, and 3
69 EXHIBIT(S) Chart
70 EXHIBIT(S) Transcript Excerpt
71 LETTER / CORRESPONDENCE TO JUDGE.
72 AFFIDAVIT OR AFFIRMATION IN REPLY: Reply Affirmation of Ronald G. Hull, Esq.
73 MEMORANDUM OF LAW IN REPLY in Further Support of Motion to Dismiss
74 MEMORANDUM OF LAW IN REPLY
75 MEMORANDUM OF LAW IN REPLY in Support of the State's Motion to Dismiss
76 AFFIDAVIT OR AFFIRMATION IN REPLY: Affidavit of Scott E. Sheeley
77 LETTER / CORRESPONDENCE TO JUDGE
78 LETTER / CORRESPONDENCE TO JUDGE
79 LETTER TO JUDGE The State's letter re: Paynter and related cases under the Education Article
80 LETTER TO JUDGE: K. Foss Letter to Judge Ark re Education Article Cases.
81 LETTER TO JUDGE: FAFE's Letter to Judge Ark re Education Article Cases