SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

THE STATE OF NEW YORK
and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiffs, Cross-Defendants,

and

GREEN EDUCATION AND LEGAL FUND, LIGHTS OUT NORLITE, BRADFORD BLAUHUT, DEBORAH LINDLEY, MARK BELOKOPITSKY, and KAREN ROBINSON,

Plaintiffs, Cross-Plaintiffs

vs.

NORLITE, LLC,

Defendant.

Index No. 907689-22

STATE'S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS

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PRELIMINARY STATEMENT

Intervenors assert that the New York State Department of Environmental Conservation (DEC) violates the Green Amendment, which guarantees each person a right to clean air and water, and to a healthful environment. Intervenors are not satisfied with DEC and the State of New York's (collectively, the State's) enforcement action requiring Norlite to curtail its emissions. Instead, intervenors take the extraordinary step of asking this Court to direct DEC to revoke Norlite's permits.

Intervenors are not entitled to the relief they seek. A court may compel an agency to take action only when the agency has a legal duty to do so. DEC has no legal duty here because it has discretion over when and how it enforces the Environmental Conservation Law and its regulations. But even if DEC had such a duty and the Court could compel it to enforce the Environmental Conservation Law and regulations against Norlite, the Court cannot direct DEC *how* to enforce. DEC has exercised its discretion by issuing multiple notices of violation, commencing this lawsuit to bring Norlite into regulatory compliance, and obtaining a preliminary injunction to ensure that Norlite's operations do not endanger the public. Intervenors are not entitled to an order compelling DEC to take specific enforcement action against Norlite.

Nothing in the Green Amendment changes DEC's discretion to enforce the Environmental Conservation Law against a private party. Rather, constitutional rights—like due process and free speech—typically *limit* the action that government can take against private parties; they do not create affirmative obligations. Where

the New York constitution imposes an affirmative obligation, it does so explicitly, which is not the case here. In the absence of mandatory language, the Green Amendment does not alter DEC's enforcement discretion. Accordingly, the Court should dismiss intervenors' Green Amendment claim against DEC.

LEGAL FRAMEWORK

A. The Air Pollution Control Act and 6 NYCRR Part 211

Facilities such as Norlite are subject to comprehensive inspection, monitoring, permitting, and enforcement oversight by DEC (*see* ECL Article 19; 6 NYCRR Parts 200, 201, 211). In the Air Pollution Control Act—part of the Environmental Conservation Law—the Legislature declared that it is "the policy of the state of New York to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health and welfare and the public enjoyment" (ECL 19-0103). The purpose of the Air Pollution Control Act is therefore "to safeguard the air resources of the state from pollution by: (1) controlling or abating air pollution. . . and (2) [preventing] new air pollution" (ECL 19-0105).

To implement these goals, the Legislature empowered DEC to promulgate regulations (ECL 19-0303). The regulations "require owners and operators of air contamination sources to obtain a permit or registration from the department for the construction and operation of such sources" (6 NYCRR 201-1.1[a]). DEC "*may* suspend, reopen, renew, modify or revoke a permit" in accordance with its procedures (6 NYCRR 201-1.12[a] [emphasis added]).

DEC defined "[a]ir contaminant or air pollutant" as "[a] chemical, dust, compound, fume, gas, mist, odor, smoke, vapor, pollen or any combination thereof" (6 NYCRR 200.1[d]). DEC then prohibited a person from "caus[ing] or allow[ing] emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property" (*id.* 211.1). DEC imposed this prohibition "[n]otwithstanding the existence of specific air quality standards or emission limits," and it "applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others" (*id.*).

B. Hazardous Waste Management

In addition to air emissions, DEC has authority to regulate the management of hazardous wastes, as consistent with federal law (ECL 27-0900). Entities that store, transport, treat, or dispose of hazardous wastes must receive a permit from DEC (ECL 27-0913[1]). Subject to procedural requirements, DEC "*may* . . .deny, suspend, revoke or modify any permit" (ECL 27-0913[3] [emphasis added]; *see also* ECL 70-0115 [describing procedure for permit modifications and revocations]).

DEC promulgated regulations to implement Article 27 of the Environmental Conservation Law (6 NYCRR 373-1.1[a]). The regulations allow DEC to set appropriate permit conditions and to take enforcement action where the permittee does not comply (6 NYCRR 373-1.6[a][1]). The regulations also explain the circumstances and manner in which a permit can be modified (*see* 6 NYCRR 373-

1.7; *see also* 6 NYCRR 373-1.8 [describing duration and renewal of hazardous waste permits).

C. The Green Amendment

In November 2021, New York adopted § 19 to Article I of the New York State Constitution, which is commonly called the Green Amendment. The Green Amendment provides that: "Each person shall have a right to clean air and water, and to a healthful environment." The Green Amendment became effective on January 1, 2022.

During debate in the Assembly and Senate over the Green Amendment, the legislative sponsors recognized a "context of need" that had arisen from new and as yet unregulated environmental harms, such as perfluorinated compounds, including "[n]ew contamination events, new threats to the public health in places like Hoosick Falls and Newburgh and West Hampton" (NYSCEF Doc No. 37 at 11-12, Assemblyman Englebright, NY Assembly Debate on Assembly Bill A6279, Apr. 24, 2018, in *Fresh Air for the Eastside, Inc v State of New York*, Sup Ct, Monroe County, Index No. E2022000699).

In enacting the Green Amendment, New York joined other states that have enacted some form of environmental constitutional amendment. Notably, Pennsylvania, Hawaii, and Montana have adopted environmental protections in their state constitutions. The language of those provisions, in both their similarities to New

York's amendment and in their differences, is instructive for interpreting New York's adopted language.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Norlite runs a hazardous waste industrial furnace, mine, and rock aggregate production facility in Cohoes, New York (NY St Cts Elec Filing [NYSCEF] Doc No. 123, Intervenors' Complaint, ¶¶ 1, 4 37-30).[2] Specifically, Norlite uses hazardous

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

> Pennsylvania: The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. Pa. Const. art. I, § 27.
>
> Hawaii: Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. Haw. Const. art. XI, § 9.
>
> Montana: The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. Mont. Const. art. IX, § 1.

[2] For the purposes of this motion to dismiss only, the State accepts the facts as alleged in intervenors' complaint. If the State does not prevail on this motion, it will contest many of these allegations.

waste as fuel for two kilns that heat shale into a rock aggregate product (*id.* ¶ 37-39). The resulting aggregate is used as a construction material (*id.* ¶ 36). Norlite is adjacent to a public housing project called the Saratoga Sites, and is near other environmental justice communities (*id.* ¶¶ 31, 33).

As part of its operations, Norlite has multiple DEC-issued permits, including an air emissions permit (*see id.* ¶ 138) and a hazardous waste permit (*see id.* ¶ 151). The current air permit, effective January 1, 2016, allows Norlite to operate within certain emissions limits (*see* DEC, Permit Under the Environmental Conservation Law [Facility DEC ID 4010300016] [Jan. 1, 2016], available at: https://www.dec.ny.gov/fs/projects/Norlite/Permits/Air/20151231atvrenewal.pdf). DEC modified the air permit to address plant upgrades, effective October 7, 2019 (DEC, Permit Under the Environmental Conservation Law [Facility DEC ID 4010300016] [Oct. 7, 2019], available at: https://www.dec.ny.gov/fs/projects/Norlite/Permits/Air/20191004atvmod6.pdf). In addition, a January 1, 2016 hazardous waste permit allows Norlite to store and dispose of hazardous waste (DEC, Permit Under the Environmental Conservation Law [Facility DEC ID 4-0103-00016] [Jan. 1, 2016], available at: https://www.dec.ny.gov/fs/projects/Norlite/Permits/HW/20151231hwpermitrenewal.pdf).[3]

[3] Norlite's DEC-issued permits, including with the history of modifications, are available on DEC's Website (*see* DEC, Index of /fs/projects/Norlite/Permits, https://www.dec.ny.gov/fs/projects/Norlite/Permits/ [last accessed Aug. 21, 2023]).

Norlite's processes cause fugitive emissions, including of particulate matter 10 microns and below (PM_{10}), containing crystalline silica, as well as larger particle size dust (NYSCEF Doc No. 123 ¶¶ 5, 91, 103). PM_{10} and crystalline silica are harmful to human health (*see id.* ¶¶ 94, 99). In 2021 and 2022, DEC conducted a range of testing on these emissions (*see id.* ¶ 103).[4] DEC found that between August 1, 2021 and July 10, 2022, the PM_{10} 24-hour average in the surrounding community was 71.4 $\mu g/m^3$ (*id.*). DEC determined that Norlite caused those elevated levels through its emissions (*id.* ¶ 104).

On October 11, 2022, the State commenced this action to protect the public health by bringing Norlite into regulatory compliance (NYSCEF Doc No. 1, State's Complaint). Further, on November 10, 2022, the State moved for a preliminary injunction against Norlite to prevent excessive emissions, arguing that Norlite's emissions of $PM_{10,}$ including crystalline silica, posed a danger to public health (NYSCEF Doc No. 15, State's Memorandum of Law in Support of Preliminary Injunction, at 5). On December 20, 2022, unsatisfied with the State's enforcement actions, intervenors requested permission to enter this case (NYSCEF Doc Nos. 45-49).

On February 15, 2023, the Court granted the State's Preliminary Injunction and Order on Consent (the Order), with the goal of protecting public health (*see* NYSCEF Doc No. 71, Preliminary Injunction Order, at 2-3). The Order "enjoin[s]

[4] DEC's February 2022 Interim Report describes DEC's testing and results (*see* NYSCEF Doc No. 18, Interim Report).

[Norlite] from causing or allowing emissions of air contaminants from the Facility which are injurious to human life in violation of ECL Article 19 and 6 NYCRR 211.1" (*id.* at 3). It further requires that, within 90 days of its entry (by May 16, 2023), "Norlite shall implement the. . . Emissions Program" (*id.*). Under the Emissions Program, if Norlite's emissions approach a PM_{10} 1-Hour average of 380 µg/m^3 or a PM_{10} 24-Hour average of 50 µg/m^3, Norlite must "implement measures to ensure such thresholds based upon 1-minute data are not exceeded" (*id.* at 14). Further, Norlite must "implement any and all measures necessary to ensure the preceding thresholds are not exceeded" (*id.*).

The Court also granted intervenors' motion to intervene (NYSCEF Doc No. 119, Decision and Order). On June 29, 2023, intervenors filed their complaint, alleging a claim against DEC for violating the Green Amendment (*see* NYSCEF Doc No. 123 ¶¶ 133-146). In doing so, intervenors acknowledge that DEC has issued multiple violations and taken other enforcement actions against Norlite, including orders on consent and a cease-and-desist notice (*id.* ¶¶ 63-78). Intervenors' own papers acknowledge other enforcement actions, including an additional notice of violation issued on May 12, 2023 (*see* NYSCEF Doc No. 90, Notice of Violation). Nonetheless, intervenors assert that "anything less that shutting down" Norlite would violate their constitutional rights (*see* NYSCEF Doc No. 123 ¶ 144).

The State moves to dismiss intervenors' third cause of action, which attempts to assert that DEC violated the Green Amendment. The State takes no position on intervenors' claims against Norlite.

ARGUMENT

THE COURT MAY NOT COMPEL DEC TO TAKE SPECIFIC ENFORCEMENT ACTIONS AGAINST NORLITE

In their complaint, intervenors seek a declaration that DEC's permits allowing Norlite to operate violate the Green Amendment and they request an injunction that directs DEC to "vacate or rescind the current Hazardous waste and Air Permits applicable to the Facility and not permit the Facility to resume operations" (*id.* ¶¶ 149, 151). However, DEC has discretion in enforcing the Environmental Conservation Law and its regulations. The Court may not compel DEC to take enforcement action against Norlite.[5]

But even if the Court could order DEC to enforce the applicable laws and regulations against Norlite—which the Court could not—that is not what intervenors ask the Court to do, nor could they because DEC brought this case to enforce those laws and regulations. Instead, intervenors ask the Court to direct DEC how to enforce the law—that is, to revoke Norlite's permits—which the Court may not do. Nothing in the Green Amendment overrides DEC's well-established enforcement discretion.

A. DEC Has Discretion Over Its Enforcement Decisions.

In violation of the principle that courts do not interfere with the executive department's duties, intervenors ask this Court to control DEC's enforcement discretion by directing DEC to revoke Norlite's operating permits. However, "the

[5] To the extent that intervenors challenge DEC's review of any of Norlite's permits, their claims are premature. They must wait until DEC completes permit review and then they may file an article 78 proceeding challenging any permit that DEC may issue.

judiciary is loathe to interfere with the executive department of the government in the exercise of its official duties, unless some specific act or thing which the law requires to be done has been omitted" (*Matter of Walsh v LaGuardia*, 269 NY 437, 441-442 [1936] [quotation marks and citation omitted]). Compelling an agency to act "is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks omitted]). Intervenors may only seek to compel state action "to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*id.*). A duty to perform does not include "an act in respect to which [a public] officer may exercise judgment or discretion" (*id.*).

Moreover, even where an agency has a legal duty to act, a court may only compel the agency to perform that duty (*id.*). A court "may not direct how [the agency] shall perform that duty" (*id.* [internal quotation marks omitted]).

The limitation on a court's power to direct the actions of the executive branch has particular force where a party seeks to compel a regulatory agency to take action against a third party. An agency's enforcement decision is "general[ly] unsuitab[le] for judicial review" because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise" (*Heckler v Chaney*, 470 US 821, 831 [1985]). "[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies,

and, indeed, whether the agency has enough resources to undertake the action at all" (*id.*). "The agency is far better equipped than the courts to deal with the many variables involved" (*id.*).

What is more, as the United States Supreme Court recognized about federal agencies in *United States v Texas* (143 S Ct 1964, 1972 [2023]), DEC must balance its enforcement priorities based upon available administrative resources. If plaintiffs could sue DEC to compel specific enforcement action, plaintiffs and courts, not DEC, would decide how to prioritize DEC's enforcement resources—and would do so based, as here, on the facts of individual lawsuits rather than on "the ever-shifting public-safety and public-welfare needs" of all New Yorkers (*see id.*).

Courts have repeatedly held that state agencies have prosecutorial discretion in how they enforce the law. For example, in *Matter of Community Action Against Lead Poisoning v Lyons* (43 AD2d 201, 203 [3d Dept 1974], *affd* sub nom. *Stratton v Lyons*, 36 NY2d 686 [1975]), the Third Department held that petitioners could not demand that the New York Department of Health take certain enforcement measures to screen for elevated blood levels in children because the Department of Health had discretion to "exercise forthwith their supervisory responsibilities and duties to assure the performance of all obligations required by the Public Health Law." Courts have further held that DEC has prosecutorial discretion over the Environmental Conservation Law (*see, e.g.*, *Matter of New York Pub. Interest Research Group v Town of Islip*, 71 NY2d 292, 306 [1988]; *Matter of New York Constr. Materials Assn., Inc. v*

New York State Dept. of Envtl. Conservation, 83 AD3d 1323, 1329 [3d Dept 2011] [rejecting claim where DEC promised to "exercise enforcement discretion"]).

DEC has no legal duty to take enforcement action. Instead, DEC has discretion to decide when and how to enforce the Environmental Conservation Law and its regulations. Indeed, the permits at issue here are based on statutes and regulations that highlight DEC's enforcement discretion (*see* ECL 70-0115 ["the department *may* modify, suspend or revoke a permit"] [emphasis added]; 6 NYCRR 201-1.12 ["The department *may* suspend, reopen, renew, modify or revoke a permit"] [emphasis added]; 6 NYCRR 373-1.6[a] [providing authority to take enforcement action for non-compliance with hazardous waste permit conditions]; 6 NYCRR 621.13[a] ["Permits *may* be modified, suspended or revoked at any time by the department"] [emphasis added]; *see also* ECL 71-0301 ["(T)he commissioner *may*, without prior hearing, order such person. . . to discontinue, abate or alleviate such condition or activity"] [emphasis added]).

But even if DEC had a legal duty to enforce the Environmental Conservation Law and regulations against Norlite—which it does not—the Court may not direct how DEC performs that duty (*see Alliance to End Chickens as Kaporos*, 32 NY3d at 1093). But that is what intervenors ask the Court to do. DEC brought this case to enforce the Environmental Conservation Law and regulations against Norlite and has already obtained a preliminary injunction to protect the health of the surrounding community (*see* NYSCEF Doc Nos. 15-39, 71). Intervenors nonetheless ask the Court to direct DEC to enforce the law by revoking Norlite's permits. While

DEC may ultimately take that particular enforcement action, the Court may not direct DEC to do so (*see New York Pub. Interest Research Group*, 71 NY2d at 306; *Community Action Against Lead Poisoning*, 43 AD2d at 203; *New York Constr. Materials Assn.*, 83 AD3d at 1329).

Because intervenors are not entitled to a Court order compelling DEC to take additional enforcement action against Norlite that involves an exercise of DEC's discretion, the Court should dismiss intervenors' complaint as against DEC (*see Alliance to End Chickens as Kaporos,* 32 NY3d at 1093).

B. The Green Amendment Does Not Override DEC's Enforcement Discretion Against Norlite.

Nothing in the Green Amendment creates an affirmative obligation for DEC to use its enforcement discretion as intervenors request. Further, the Green Amendment does not alter the prohibition against compelling DEC to exercise its enforcement discretion in a specific manner against Norlite. The Green Amendment's language—"[e]ach person shall have a right to clean air and water, and to a healthful environment"—does not require DEC to take specific enforcement actions.

Moreover, constitutional amendments typically limit government action, rather than create affirmative duties. For example, "the State and Federal constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons" (*SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 500, 502 [1985] [citations omitted]); the right to due process clause imposes "a limitation on the State's power to act," (*Deshaney v Winnebago Cty. Dep't of Soc. Servs.*, 489 US 189, 195 [1989]); and the equal protection clause "keeps

governmental decisionmakers from treating differently persons who are in all relevant respects alike" (*Nordlinger v Hahn*, 505 US 1, 10 [1992]). Indeed, the United States Supreme Court ruled in *Deshaney* that the due process clause does not obligate a state to take action against a private party because that clause "generally confer[s] no affirmative right to governmental aid" (489 US at 196). Following this pattern, the Green Amendment can limit government action, but does not require DEC to take specific enforcement actions against a private party.

In contrast, where New York's constitution creates affirmative obligations, it does so explicitly. To illustrate, N.Y. Const. art. XI, § 1, states that "[t]he legislature *shall* provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 178 [2005] [finding provision "mandate[s] that the opportunity for a sound basic education be provided to all"]). A similar affirmative provision applies to public assistance. "The aid, care and support of the needy are public concerns and *shall* be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine" (N.Y. Const. art. XVII, § 1 [emphasis added]; *see also Tucker v Toia*, 43 NY2d 1, 7 [1977] ["assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution"]. Again, the constitution affirmatively indicates that "protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor *shall* be made by the state" (N.Y. Const, art. XVII, § 3 [emphasis added[). The Green

Amendment provides no similar language creating an affirmative obligation on the State.

Consistent with this approach, other states with comparable environmental amendments have interpreted that language to limit state action rather than create affirmative obligations. For example, Pennsylvania's constitution states: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" (Pa. Const. art. I, § 27). The Pennsylvania Supreme Court has found that this language "*affirms a limitation* on the state's power to act contrary to this right" (*Robinson Township v. Commonwealth*, 623 Pa. 564, 646 [2013] [emphasis added]). That provision imposes "an obligation on the government's behalf to *refrain from unduly infringing upon or violating the right*, including by legislative enactment or executive action" (*id.* at 647 [emphasis added]).

Unlike New York's Green Amendment, Pennsylvania's constitution also contains a second provision specifying that Pennsylvania is a trustee of natural resources so "the Commonwealth shall conserve and maintain them for the benefit of all the people" (*id.*). It is this second provision that the Pennsylvania Supreme Court found creates a duty for the state to "restrain the actions of private parties" (*Robinson*, 623 Pa. at 656). However, New York's Green Amendment does not contain any language comparable to this second provision in Pennsylvania's amendment. Therefore, the Green Amendment does not create an affirmative duty of the State to take specific enforcement actions against private parties.

Montana has also held that its green amendment limits government action, rather than creates an affirmative duty on the government to enforce against third parties. Montana's constitution states: "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations" (Mont. Const. art. IX, § 1). The amendment establishes "a fundamental right which *government action may not infringe* except as permissible under strict constitutional scrutiny." (*Clark Fork Coal. v Mont. Dep't of Nat. Res. & Conservation*, 403 Mont. 225, 264 [2021] [emphasis added]). Thus, the court looked at a challenge to a review of a water use permit, in the context of whether government action infringed on rights—not whether the government had an obligation to enforce against a third party (*see id.*). The court then rejected the challenge, holding that the government's review did not interfere with the right to a clean and healthful environment (*id.* at 274; *cf. Mont. Envtl. Info. Ctr. v Dept. of Envtl. Quality*, 296 Mont. 207, 231 [1999] [holding regulation, which the government issued, allowing water discharge of carcinogen violated state constitution in an as applied challenge]). Again, following this interpretation, the Green Amendment may limit government action, or prevent the State from taking actions that infringe on a right, but it does not mandate State action.

Supreme Court, Monroe County decided to the contrary in *Fresh Air for the Eastside, Inc v State of New York*, ruling that the State could be compelled to take action against the operator of a landfill (*see* NYSCEF Doc No. 86 at 2, Decision and Order, in *Fresh Air for the Eastside, Inc v State of New York*, Sup Ct, Monroe County,

Index No. E2022000699). The State's appeal of that decision is pending in the Appellate Division, Fourth Department, along with the appeals of two other parties (*see* NYSCEF Doc Nos. 90, 94, 97, Notices of Appeal, in *Fresh Air for the Eastside, Inc v State of New York*, Sup Ct, Monroe County, index No. E2022000699). In any event, that court addressed only the question of whether it could compel the State to take action. Here, in this case, the question is whether the State can be compelled to take a particular enforcement action against Norlite.

Even if the Green Amendment compels DEC to take enforcement action, it does not alter DEC's discretion in *how* it enforces the Environmental Conservation Law and its regulations against Norlite, especially where the State is already enforcing against Norlite. The Legislature has entrusted DEC with both the responsibility and the discretion to determine how to use its enforcement resources and DEC should be allowed to continue to exercise that discretion in the absence of any language in the Green Amendment abrogating it. Accordingly, the Court should dismiss the intervenors' complaint as against DEC.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court dismiss the third cause of action in the intervenors' complaint. If the Court denies this motion, the State requests 30 days to answer the intervenors' complaint.

Dated: August 24, 2023
Albany, New York

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned attorney certifies:

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Dated: August 24, 2023

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