STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SENECA LAKE GUARDIAN, INC., SENECA FALLS ENVIRONMENTAL ACTION COMMITTEE, WATERLOO CONTRACTORS, INC., d/b/a WATERLOO CONTAINER COMPANY, ABSOLUTE AUTO REPAIR, INC., VALERIE SANDLAS, and HEATHER BONETTI,

Plaintiffs,

**DECISION AND ORDER**
Index No.: 902866-24

-against-

SENECA MEADOWS, INC. and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

On March 25 2024, Seneca Lake Guardian, Inc. ("SLG"), Seneca Falls Environmental Action Committee ("SFEAC"), Waterloo Contractors, Inc. d/b/a Waterloo Container Company ("Waterloo"), Absolute Auto Repair, Inc. ("Absolute"), Valerie Sandlas, and Heather Bonetti ("individual plaintiffs") (collectively "plaintiffs") commenced this action against Seneca Meadows, Inc. ("SMI") and The New York State Department of Environmental Conservation ("DEC") (collectively "defendants"), seeking, in part, declaratory judgment stating that SMI and DEC are violating plaintiffs' constitutional rights under Article I §19 of the New York State Constitution ("the Green Amendment") to clean air and a healthful environment "by failing to remedy the harm caused by the Seneca Meadows Landfill," located at 1786 Salcman Road Waterloo, New York 13165 ("the Landfill") and facilitating the Landfill's continued operations" (NYSCEF Doc. No. 2). Plaintiffs also seek the "immediate abatement of the persistent, noxious odors emanating from the Landfill" and argue that defendants must be enjoined from "authoriz[ing], encourag[ing] or facilitat[ing] the continued operation of the...Landfill" which

necessarily includes an enjoinment of DEC's future approval of the proposed Landfill expansion (NYSCEF Doc. No. 2).

On May 31, 2024, DEC and SMI separately filed motions to dismiss the Complaint pursuant to CPLR 3211(a)(2) and (7) alleging ripeness issues and failure to state a cause of action. Plaintiffs separately opposed the motions to dismiss, and the defendants replied to each argument made in opposition. Following oral argument, plaintiffs filed a sur-reply in opposition to defendants' motions to dismiss.

**Background**

The Landfill is owned and operated by SMI pursuant to DEC Part 360 Permit #8-4532-00023/00001-0 ("solid waste permit") and DEC Air Title V Facility Permit #8-4532-00023/00001-0 ("emissions permit"). The solid waste permit, last renewed on October 31, 2017, permitted SMI to construct and operate a municipal solid waste landfill at the property with an approved design capacity of 6000 tons per day and a Waste Tire Processing Facility. The solid waste permit is set to expire on December 31, 2025. The Landfill is comprised of six smaller landfills: "the Tantalo Waste Disposal Site (closed), the Existing Landfill with AB Overfill, the Southeast Landfill and Bumpout, and the Landfill Expansion areas" (NYSCEF Doc. No. 14). On July 13, 2020, SMI submitted an application to DEC seeking to renew and modify its solid waste permit seeking to expand the size of the Landfill. Shortly thereafter, on July 15, 2020, SMI filed an emissions permit application to DEC, proposing the "Valley Infill Expansion" which would result in a lateral and vertical expansion of the existing Landfill by approximately 47 million cubic yards (NYSCEF Doc. No. 14). In its emissions permit application, SMI argued that the expansion plan would "extend the life of the facility by over 15 years" after its current permit expires on December 31, 2025 (NYSCEF Doc. No. 14).

The proposed Valley Infill Expansion is currently being reviewed under the New York State Environmental Quality Review Act ("SEQRA"), with DEC as the lead agency in charge of coordinating the environmental review process. A positive declaration was issued by DEC in March 2022 directing the preparation of a Draft Environmental Impact Statement ("DEIS") for the Valley Infill Expansion. In December 2022, a draft scoping document was posted onto the DEC Environmental Notice Bulletin for public comment for a duration of thirty days, running from December 14, 2022, to January 13, 2023, with an additional 15 days granted thereafter (NYSCEF Doc. No. 16).

According to the Complaint, on August 2, 2023, and September 1, 2023, SMI hosted public meetings wherein the community could raise concerns about the environmental and health impacts of the Landfill. Plaintiffs allege that the individual plaintiffs attended and participated in both of these meetings. Plaintiffs further contend that on January 27, 2023, SLG submitted comments to DEC in response to the Draft Scoping Document which raised issues related to the odors emanating from the Landfill. The Complaint states that although DEC was required to issue a Final Scoping Document for the DEIS by February 7, 2023, within 60 days of receipt of the Draft Scoping Document, DEC failed to do so.

In support of injunctive relief against SMI, plaintiffs allege causes of action for both private nuisance and public nuisance. Plaintiffs also seek declaratory judgment against both DEC and SMI, arguing that by failing to remedy the harm caused by the Landfill and facilitating the Landfill's continued operations, SMI and DEC violate plaintiffs' right to clean air and a healthful environment, guaranteed by Article I § 19 of the New York State Constitution ("Green Amendment"). Plaintiffs seek to enjoin DEC from approving the Valley Infill Expansion and

obtain a court directive ordering the immediate abatement of odors and vectors alleged to have impacted plaintiffs.

**Discussion**

Pursuant to CPLR 3211(a)(2), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that… the court has no[] jurisdiction of the subject matter of the cause of action." This "is the proper vehicle to dismiss a nonripe controversy, even though the conceptual focus of the ripeness doctrine is upon the maturity of the claim asserted" (*Matter of New York State Inspection, Sec. and Law Enf't Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 241, n3 [1984]). "A party may [also] move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the pleading fails to state a cause of action" (CPLR 3211[a][7]). When assessing a pre-answer motion to dismiss for failure to state a cause of action, the Court "'must give the pleading[ ] a liberal construction, accept the allegations as true and accord the plaintiff[ ] every possible favorable inference'" (*Maki v. Travelers Cos., Inc.*, 145 A.D.3d 1228, 1230 [3d Dep't 2016], quoting *Chanko v. Am. Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 52 [2016], *appeal dismissed* 29 N.Y.3d 943 [2017]; *see Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 [2002]). "Such favorable treatment, however, 'is not limitless'" (*Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d 1218, 1219 [3d Dep't 2017], *aff'd* 31 N.Y.3d 1090 [2018], quoting *Tenney v. Hodgson Russ, LLP*, 97 A.D.3d 1089, 1090 [3d Dep't 2012]; *see Rodriguez v. Jacoby & Meyers, LLP*, 126 A.D.3d 1183, 1185 [3d Dep't 2015], *lv. denied* 25 N.Y.3d 912 [2015]). Indeed, "[n]otwithstanding the broad pleading standard, bare legal conclusions with no factual specificity do not suffice to withstand a motion to dismiss (*Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d at 1219; *see Godfrey v. Spano*, 13 N.Y.3d 358,

373 [2009]; *Rodriguez v. Jacoby & Meyers, LLP*, 126 A.D.3d at 1185). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 [2017] [citations omitted]; *accord Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, *supra* at 1219). "Upon the submission of evidentiary material in support of such a motion, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Xu v. Van Zwienen*, 212 A.D.3d 872, 874 [2d Dep't 2023] [internal quotation marks and citation omitted]).

I. Private Nuisance

Within the Complaint, plaintiffs argue that SMI, through its "repeated and continuing intentional and unreasonable acts and omissions have caused persistent, noxious and offensive odors which substantially and unreasonably interfere with Plaintiffs' everyday comfortable enjoyment of their lives and property" (NYSCEF Doc. No. 2). More specifically, plaintiffs allege that the odors caused by SMI prevented plaintiffs from "spending time outside their business and properties and have interfered with the conduct of business by the business Plaintiffs" (NYSCEF Doc. No. 2). Plaintiffs argue that the acts and omissions related to the odors caused by SMI are intentional because SMI "knows or is substantially certain that the odors are occurring" yet failed to prevent their occurrence (NYSCEF Doc. No. 2). Plaintiffs then state that SMI's acts and omissions are unreasonable because steps could have been taken to reduce the severity of the odors and their impacts, and note that although SMI had actual notice of this nuisance and a reasonable

opportunity to abate it, they failed to do so. Plaintiffs maintain that because the acts and omissions of SMI have caused and will continue to harm plaintiffs, injunctive relief is warranted to immediately abate the nuisance.

In support of its motion to dismiss, SMI argues that plaintiffs' allegations that the odors caused widespread harm are "incompatible with a private nuisance claim under New York Law" (NYSCEF Doc. No. 27). SMI states that while a public nuisance interferes with the use and enjoyment of property by a "considerable number" of people, a private nuisance interferes with the use and enjoyment of property by "one person or relatedly few" (NYSCEF Doc. No. 27, quoting *Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 [1977]) ("*Copart*"). SMI emphasizes that *Copart* cites Chief Judge Cardozo's holding in *McFarlane v. City of Niagara Falls* (247 N.Y. 340, 344 [1928]), which noted that a private nuisance "threatens one person or a few" (NYSCEF Doc. No. 27). According to SMI, the Third Department "reiterated this limitation on private nuisance claims in *Davies v. S.A. Dunn & Co.*, 200 A.D.3d 8, 11 (3d Dep't 2021) ("*Davies*"), a landfill odor nuisance case" (NYSCEF Doc. No. 27).

While SMI did not describe the facts of *Davies*, it argued that the Fourth Department recently cited *Davies* in *William Metrose, Ltd. v. Waste Mgmt. of N.Y., LLC*, 225 A.D.3d 1223, 1223-24 (4th Dep't 2024) ("*Metrose*"), in dismissing a private nuisance claim which alleged widespread harm from landfill odors. According to SMI, in *Metrose*, although a real estate developer claimed "that odors from the landfill diminished its property values and caused lost profits and reputational harm, the Court found that a private nuisance claim was not viable, "[b]ecause the allegations 'indicate[d]' that the odors 'affected a large number of community residents,' not one person or a relatively few people" (NYSCEF Doc. No. 27, quoting *Metrose*, 225 A.D.3d at 1224). SMI argues that the allegations in *Metrose* are analogous to those alleged

within the Complaint for a claim of private nuisance, because the harm alleged impacts "far more than one or a few people" (NYSCEF Doc. No. 27). Looking to the Complaint, SMI contends that plaintiffs allege that the Landfill's odors "have impacted the surrounding area, even affecting neighborhoods over 2.5 miles away from the Landfill" (NYSCEF Doc. No. 27, citing Compl. ¶¶ 17-20, 32, 49-52). SMI points out that the Complaint also alleges "that odors have resulted in 'hundreds' of complaints from the nearby communities and interfered with the 'rights of the public at large' " (NYSCEF Doc. No. 27, quoting Compl. ¶¶ 37-38, 42, 49-52, 69).

In opposition, plaintiffs claim that to state a cause of action for private nuisance, one must only demonstrate " 'proof of intentional action or inaction that substantially and unreasonably interferes with other people's use and enjoyment of their property' " (NYSCEF Doc. No. 30, quoting *DelVecchio v. Collins*, 178 A.D.3d 1336, 1336 [3d Dep't 2019] [internal quotation marks, brackets and citations omitted]). Plaintiffs argue that SMI misunderstands their cited precedent, as well as what is required for a private nuisance cause of action. Plaintiffs argue that when citing to *Copart*, SMI incorrectly implied that "one person or relatively few" is an essential element of a private nuisance claim, when it was only used to draw "a distinction fundamental to the type of right violated" (NYSCEF Doc. No. 30). Plaintiffs argue that *Copart* only stated that a "private nuisance affects 'one person or relatively few' in drawing a contrast to public nuisance" (NYSCEF Doc. No. 30, quoting *Copart*, 41 N.Y.2d at 568). Plaintiffs maintain that the Court of Appeals has made clear in *Copart* that "where a defendant's activities violate publicly held rights, a public nuisance claim exists, and where they violate the private rights of individual landowners, the claim is one of private nuisance" (NYSCEF Doc. No. 30).

Plaintiffs then argue that in *Metrose*, the Fourth Department incorrectly interpreted the legal standard set forth in *Copart* and *Davies*, when it dismissed plaintiff's private nuisance cause

of action. According to plaintiffs, in *Metrose*, the Court stated because the plaintiff alleged that noxious odors "affected a large number of community residents" (225 A.D.3d at 1224), and "a private nuisance is one that 'threatens one person or...relatively few' " (*id.* at 1224, quoting *Copart*, 41 N.Y.2d at 568), the cause of action for private nuisance was improper. Plaintiffs reiterate that this comparison provided in *Copart* was only used to draw a "distinction between public and private nuisance" and is improperly applied in *Metrose* to deny judicial redress where appropriate (NYSCEF Doc. No. 30).

Plaintiffs contend that in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970), the Court of Appeals addressed the remedy for a private nuisance action, where defendant, a cement manufacturer, was "found...to have damaged the nearby properties of plaintiffs" (NYSCEF Doc. No. 30, quoting *id.* at 223). Plaintiffs argue that if private nuisance was not proper in this context where many neighbors suffer the same damages, the case would have never proceeded to trial (citing *Burdick v. Tonoga, Inc.*, 191 A.D.3d 1220 [3d Dep't 2021]; *Ivory v. International Bus. Machines Corp.*, 116 A.D.3d 121 [3d Dep't 2014]). Plaintiffs also note that in *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 343 (1928), the Court stated that "[o]ne who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions." Plaintiffs argue that this statement "is incompatible with the notion that liability can be escaped where a defendant poisons the air of more than one neighbor" (NYSCEF Doc. No. 30).

In reply, SMI argues that plaintiffs' argument that *Copart* was only "distinguishing between the 'type of right' interfered with by public and private nuisances and not describing a basic tenet of nuisance law...has no merit" (NYSCEF Doc. No. 34). According to SMI, *Copart* explained that "a public nuisance interferes with a common right and harms a 'considerable

number' of people, whereas a private nuisance interferes with the use and enjoyment of property and impacts 'one person or a relatively few' " (NYSCEF Doc. No. 34, quoting *Copart*, 41 N.Y.2d at 568). SMI states that this language makes clear that public and private nuisance can be distinguished not just by the type of right violated or interfered with, but are also distinguished by "the extent of the injury alleged" (NYSCEF Doc. No. 34). SMI argues that the Third Department recognized this distinction in *DelVecchio v. Collins*, 178 A.D.3d 1336 (3d Dep't 2019) ("*DelVecchio*"), cited by plaintiffs. According to SMI, although the defendants in that matter "argued that dust and noise from a landscaping company amounted "to a public rather than a private nuisance" (NYSCEF Doc. No. 34, quoting *id.* at 1337), the Third Department determined that plaintiff alleged a cause of action for private nuisance because the business "did not impact a considerable number of persons" (NYSCEF Doc. No. 34, quoting *id.* at 1337). SMI argues that plaintiffs' cited caselaw fails to reject this limitation on private nuisance claims. Drawing the Court's attention once again to the Complaint, SMI notes that "[p]laintiffs plead harm to far more than a few people" (NYSCEF Doc. No. 34, citing Compl. ¶¶ 17-20, 32, 37-38, 42, 49-52, 69).

Considering the following contentions, the Court examines the disputed law surrounding private and public nuisance claims. The Court of Appeals acknowledged the ambiguity surrounding nuisance causes of action, stating that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance' " (*Copart*, 41 N.Y.2d at 565, quoting Prosser, Torts [4th ed], p. 571). *Copart* unambiguously stated that "[a] private nuisance threatens *one person or a relatively few...*, an essential feature being an interference with the use or enjoyment of land....It is actionable by the individual person or persons whose rights have been disturbed" (41 N.Y.2d at 568 [internal citations omitted] [emphasis added]). The Court then compared this to a public nuisance, which "consists of conduct or omissions which offend,

interfere with or cause damage to the public in the exercise of rights common to all..., in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of *a considerable number of persons*" (*id.* [internal citations omitted] [emphasis added]).

Applying these standards within the context of a public nuisance claim, the Court of Appeals more recently stated in *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 626-627 (2009) ("*City of New York*"), that:

> [A party] may bring an action to abate a public nuisance or the... conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort *of a considerable number of persons* (emphasis added).

In *DelVecchio*, plaintiff alleged that "the increase in dust and noise created by the operation[s]" of Collins Stone "impacted his use and enjoyment of his property because" it forced plaintiff to keep his windows closed "at all times to reduce the amount of noise and dust that enters his home," limited the amount of time he could spend outside, decreased plaintiff's property value, and increased plaintiff's property maintenance costs (178 A.D.3d at 1337). The Third Department found that accepting these allegations as true, plaintiff properly stated a cause of action for private nuisance (*id.* at 1337). The Court noted that this could not be characterized as a cause of action for public nuisance, as the harm alleged did "not impact a considerable number of persons" (*id.*, citing *City of New York*, 12 N.Y.3d at 626-627).

Considering the language of both *Copart* and *City of New York*, as well as the Third Department's recent decision in *DelVecchio*, the Court agrees that the Court of Appeals intended to distinguish public and private nuisance causes of action by both (1) the type of right violated or interfered with, and (2) the extent of the injury alleged. The parties agree that a private nuisance

interferes with an individual person or persons' "private use and enjoyment of land," whereas a public nuisance "interfere[s] with or causes damage to the public in the exercise of rights common to all" (*Copart*, 41 N.Y.2d at 568-569). Thus, the parties recognize that the Court of Appeals distinguishes between private and public nuisance by the type of right violated or interfered with.

Plaintiffs argue that the comparison made in *Copart* comparing the extent of the injury alleged was only made to distinguish between the two nuisance causes of action, and was not intended to become an element of a private nuisance claim (NYSCEF Doc. No. 30 at 16). The Court finds that the Court of Appeals has incorporated the extent of the injury alleged into its requirements for a public nuisance cause of action. In *City of New York*, the Court of Appeals applied the "considerable number of persons" language to its recitation of the elements required to bring a cause of action for public nuisance (12 N.Y.3d at 626-627). This requirement was applied by the Third Department in *DelVecchio*, insofar as the Court held that plaintiff's private nuisance claim which stated, in part, "that the properties [with]in a one-mile radius of Collins Stone are impacted by the dust and the noise…[did] not create a claim for public nuisance, because [it did] "not impact a considerable number of persons" (178 A.D.3d at 1337). The Third Department more recently stated in *Duffy v. Baldwin*, 183 A.D.3d 1053, 1053 (3d Dep't 2020), that a cause of action for public nuisance consists, in part, of "conduct or omissions which… endanger or injure the property, health, safety or comfort of a considerable number of persons."

While it is clear that the Court of Appeals incorporated the extent of the injury alleged into the requirements to allege a public nuisance, the same cannot be said for a cause of action for private nuisance. After distinguishing between the two types of nuisance claims, the Court of Appeals in *Copart* explicitly stated that "one is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and

such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities" (41 N.Y.2d at 569 [citations omitted]). Thus, although the Court of Appeals distinguished between the two nuisance causes of action earlier in the decision, the Court of Appeals restated the elements required to state a cause of action for private nuisance, and did not incorporate the extent of the injury into the elements required. The Third Department cases which followed *Copart* incorporated the same three aforementioned elements when stating the elements required for a private nuisance, excluding any terminology related to the extent of the injury (*see Vacation Vil. Homeowners Assn., Inc. v. Town of Fallsburg*, 233 A.D.3d 1196, 1198 [3d Dep't 2024]; *Burdick v. Tonoga, Inc.*, 191 A.D.3d 1220, 1220 [3d Dep't 2021]; *Duffy v. Baldwin*, 183 A.D.3d at 1053; *DelVecchio*, 178 A.D.3d at 1336; *Pilatich v. Town of New Baltimore*, 170 A.D.3d 1463, 1464 [3d Dep't 2019]).

According to the Complaint, "[o]ver the last decade, hundreds of verified odor complaints have originated from within the surrounding communities, including from sensitive receptor sites such as nursing homes and schools, as well as from the homes and businesses" of plaintiffs and/or the officers, employees, and customers of plaintiff businesses" (NYSCEF Doc. No. 2). Plaintiffs alleged that the in addition to plaintiffs, plaintiffs' families and visitors "are sickened and nauseated by the...odors" coming from the Landfill (NYSCEF Doc. No. 2).[1] Within their cause of action for private nuisance, plaintiffs alleged that the "repeated and continuing intentional and unreasonable acts and omissions have caused persistent, noxious and offensive odors which substantially and unreasonably interfere with Plaintiffs' everyday comfortable enjoyment of their lives and property" (NYSCEF Doc. No. 2). Considering the foregoing, the Court finds that

[1] While the Complaint also mentioned the negative impacts of the Landfill on tourism and the housing market, these allegations are not related to the acts and/or omissions of SMI and are not alleged within the context of plaintiffs' claim for private nuisance.

plaintiffs properly alleged that SMI's acts and omissions interfered with plaintiffs' interest in the private use and enjoyment of land and further alleged that the invasion was intentional and unreasonable (*see Copart*, 41 N.Y.2d at 569). The Court rejects SMI's contention that plaintiffs allege injury to "the public at large," as the portion of the Complaint which refers to harm to the "public at large" is alleged in opposition to DEC's approval of SMI's Valley Infill Expansion plan (*see* NYSCEF Doc. No. 2 at 14; Compl. at ¶ 69). Accordingly, the Court finds that plaintiffs adequately alleged a cause of action for private nuisance (*see DelVecchio*, 178 A.D.3d at 1337), and denies the portion of SMI's motion which seeks to deny plaintiffs' first cause of action for private nuisance.

II. Public Nuisance

Within their Complaint, plaintiffs argue that SMI's repeated, continuing, intentional, and "unreasonable acts and omissions caused persistent, noxious, and offensive odors which substantially and unreasonably interfere" with the business conduct of plaintiffs Waterloo and Absolute at their properties, which are located in close proximity to the Landfill (NYSCEF Doc. No. 2). More specifically, plaintiffs allege that SMI failed to control vectors, such as gulls, which have caused the gulls to roost and defecate on the businesses of Waterloo and Absolute, disgusting its employees and customers. Plaintiffs state that the odors and vectors caused by SMI have prevented Waterloo from expanding its business operations, and have caused actual economic damage to Waterloo and Absolute. Plaintiffs argue that these damages include direct or consequential damages, which plaintiff's state are "not common in the community" (NYSCEF Doc. No. 2). Plaintiffs claim that SMI's acts and omissions are intentional because SMI knows or is substantially certain that the odors and vectors are occurring yet failed to prevent their occurrence, and maintain that SMI had actual notice of the alleged nuisance and a reasonable

opportunity to abate it yet failed to do so. Plaintiffs argue that injunctive relief is warranted under the circumstances to abate the harm proximately caused by SMI's acts and omissions.

In support of dismissal, SMI argues that plaintiffs failed to allege that Waterloo and Absolute suffered a "special injury" that not only differed in degree, but also "in kind" from that of the community (NYSCEF Doc. No. 27, citing *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 294 [2001]) ("*532 Madison*"). SMI states that the relevant scope of the community must be measured by the type of injury alleged within the Complaint (citing *Davies*, 200 A.D.3d at 12). SMI argues that in *532 Madison*, the Court found that plaintiff failed to allege special injury because although the alleged harm interfered with plaintiff's right to use the public space, the "the entire community of businesses and residents [also] experienced economic loss" (NYSCEF Doc. No. 27, citing *532 Madison*, 96 N.Y.2d at 292-294). Looking to the Complaint's allegations, SMI argues that plaintiffs claim that the entire community "experienced economic harm due to odors and other impacts from the Landfill" (NYSCEF Doc. No. 27, citing Compl. ¶¶ 3, 10, 38, 49-53).

In opposition, plaintiffs argue that " '[a]llegations of pecuniary injury may be sufficient to satisfy the peculiar injury test so long as the injuries involved are not common to the entire community exercising the same public right' " (NYSCEF Doc. No. 30, quoting *Leo v General Elec. Co.*, 145 A.D.2d 291, 294 [2d Dept 1989]) ("*Leo*"). Plaintiffs state that in *Leo*, it did not matter that both commercial and recreational fishers were injured, because the damage to the commercial fishers' business differed "in kind" to that suffered by the recreational fishers. Plaintiffs assert that like the commercial fisherman, plaintiffs Waterloo and Absolute alleged pecuniary damages which are not shared by the community at large, who, while sustaining injury from the odors, do not suffer damage to their ability to earn a living. Similarly, plaintiffs argue

that while many suffer from the roosting and defecation of the gulls, not all in the community lose customers, potential employees, and expansion opportunities as a result of it (NYSCEF Doc. No. 30). Plaintiffs reject SMI's argument that the scope of the community only involves other businesses surrounding the Landfill, and counter that as is set forth in *Davies*, the proper inquiry is "a comparison of the economic injuries allegedly incurred by the plaintiffs with other nearby business owners, merchants and neighborhood residents" (NYSCEF Doc. No. 30, quoting *Davies*, 200 A.D.3d at 14). Plaintiffs emphasize that *Davies* cited to *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 (1983) ("*Burns*"), which limited the scope of the community to " 'all members of the public affected by [a transit] strike,' not just the businesses affected" (NYSCEF Doc. No. 30, quoting *id.* at 335).

In reply, SMI maintains that The Third Department and other New York courts have rejected plaintiffs' argument that a special injury is pleaded "merely because they allege harm that differs from that of 'the public' exposed to odors" (NYSCEF Doc. No. 34). SMI states that the Third Department in *Davies* limited the community to homeowners and rentals, even though allegations that odors impacted people at work, school, and recreation (NYSCEF Doc. No. 34, citing *Davies*, 200 A.D.3d at 12-16). SMI argues that the Court in *Davies* agreed with defendant that the community is "framed by the injuries alleged in" the complaint (NYSCEF Doc. No. 34, quoting *id.* at 12-13). SMI contends that the Third Department limited the scope of the community in the same manner in *Duncan v. Capital Region Landfills, Inc.*, 198 A.D.3d 1150, 1150-51 (3d Dep't 2021) and *Wheeler v. Lebanon Valley Auto Racing Corp.*, 303 A.D.2d 791, 793 (3d Dep't 2003).

SMI argues that plaintiffs misinterpreted the Court's holding in *Burns*, implying that the Court compared the alleged financial injury of the businesses to "anyone whose public rights were

violated by the transit strike" (NYSCEF Doc. No. 34), when in reality, the Court compared the alleged economic loss to every "person, firm and corporation conducting his or its business or profession" (NYSCEF Doc. No. 34, quoting *Burns*, 59 N.Y.2d at 334). SMI further states that in *532 Madison*, although the Court recognized that the general public was harmed in a different way than the harm alleged by businesses, professionals, and residents, the Court found that the alleged injury was not special, because other businesses, professional, and residents had experienced similar economic loss (NYSCEF Doc. No. 34, citing *532 Madison*, 96 N.Y.2d at 292-294). SMI then argues that plaintiffs' own cited precedent, *Leo*, does not support plaintiffs' view of the relevant community. SMI states that the Court compared the alleged injury of the commercial fisherman to other fisherman using the same water, limited the scope of injury to fishing interests, instead of comparing plaintiffs' alleged injury to anyone else using the waters (NYSCEF Doc. No. 34, citing 145 A.D.2d at 292-294). SMI reiterates that based upon these legal authorities, because Waterloo and Absolute "allege that the Landfill has interfered with the conduct of their business and caused economic damages," the applicable community for this inquiry is limited to other businesses surrounding the Landfill (NYSCEF Doc. No. 34).

"A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons" (*532 Madison*, 96 N.Y.2d at 292; *see Copart*, 41 N.Y.2d at 568; *Davies*, 200 A.D.3d at 11). " 'A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large' " (*Duffy v. Baldwin*, 183 A.D.3d 1053, 1053 [3d Dep't 2020], quoting *532 Madison*, 96 N.Y.2d at 292 [further citations omitted]). The Courts have made clear that "[t]he injury sustained must be

'different in kind, not merely in degree' " (*Davies*, 200 A.D.3d at 12, quoting *532 Madison*, 96 N.Y.2d at 294).

Based on the foregoing, the Court agrees with SMI that plaintiffs Waterloo and Absolute failed to allege a special injury. The Court of Appeals stated that "[w]hen business interference and ensuing pecuniary damage is so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn" (*532 Madison*, 96 N.Y.2d at 293). In *532 Madison*, the Court of Appeals compared the "business interference and ensuing pecuniary damage" suffered by business plaintiffs to the business interference and ensuing pecuniary damage of every other person who "maintained a business, profession or residence" in the area (*id.* at 294). Similarly, in *Burns*, plaintiffs claimed that the alleged injury "caused widespread economic dislocation and damage and substantial interference with the public health, safety, comfort and convenience within the New York City metropolitan area" (59 N.Y.2d at 333-334). The Court of Appeals stated that this alleged injury, which was, in essence, "out-of-pocket expenses...and...loss of business profits, ...were suffered by every person, firm and corporation conducting his or its business or profession in the City of New York" (*id.* at 334). The Court of Appeals noted that plaintiffs in *Leo v. General Elec. Co.* (145 A.D.2d 291), as commercial fisherman, "were able to establish that their injuries were special and different in kind," because "a loss of livelihood was not suffered by every person who fished the Hudson" (*532 Madison*, 96 N.Y.2d at 294). The Court of Appeals found that injuries in *Leo* differed from the injuries alleged from plaintiffs in *532 Madison*, wherein plaintiffs alleged injury to its businesses, professions or residences, because "every person who maintained a business, profession or residence in the heavily populated areas of Times Square and Madison Avenue was exposed to similar economic loss during the closure periods" (*532 Madison*, 96 N.Y.2d at 294).

Following the Court of Appeal's inquiry in *532 Madison*, the Court finds that where plaintiffs allege that defendant caused injury in the form of business interference and ensuing pecuniary damages, the Court must compare the alleged injury to the business interference and ensuing pecuniary damage of every other person who maintained a business or profession in the area (96 N.Y.2d at 294). Plaintiffs allege that SMI failed to control vectors, such as gulls, which have caused the gulls to roost and defecate on the businesses of Waterloo and Absolute, disgusting its employees and customers. Plaintiffs further argue that the odors and vectors caused by SMI have prevented Waterloo from expanding its business operations, and have caused actual economic damage to Waterloo and Absolute. The Court finds that these injuries allegedly suffered by Waterloo and Absolute to their business do not differ in kind from those which would be suffered by every other person who maintained a business in the area surrounding the Landfill (*see 532 Madison*, 96 N.Y.2d at 293). Accordingly, the Court finds that plaintiffs Waterloo and Absolute failed to properly state a cause of action for public nuisance against SMI. Therefore, the Court grants SMI's motion to dismiss plaintiffs' second cause of action for public nuisance.

III. Injunctive Relief – Ripeness

DEC argues that plaintiffs' attempt to stop DEC's ongoing permit application review is unripe for judicial review at this stage, as DEC has not approved any part of SMI's proposal to expand. In support, DEC included the affidavit of Thomas P. Haley, a Regional Permit Administrator employed by DEC. Haley included copies of SMI's current permits for solid waste and air, as well as copies of SMI's recent applications seeking modifications to both permits. Haley confirmed that SMI submitted an application form on July 13, 2020, seeking a modification of its solid waste management permit. Haley stated that soon thereafter, on July 15, 2020, SMI submitted an application form seeking a modification of its emissions permit. Haley maintained

that DEC sent its most recent correspondence to SMI on April 9, 2024, which informed SMI that DEC found its applications to be incomplete. In this correspondence, DEC determined that:

> The application does not provide sufficient information to demonstrate whether the Meadow View Mine mining permit would require modification for the construction or operation of the Valley Infill project – and if the mining permit does require modification, SMI must submit the modification application now, as part of the Valley Infill landfill expansion project package.... The Mine is not part of the solid waste management facility regulated under ECL Article 27 and 6 NYCRR Part 360 et seq....SMI must revise the current Valley Infill project application to delete any references to the Meadow View Mine as "onsite" or a "borrow area" and instead properly identify the Meadow View Mine (NYSCEF Doc. No. 15).

DEC further found that a determination by the New York State Office of Parks, Recreation and Historic Preservation ("OPRHP") pursuant to section 14.09 of the Parks, Recreation and Historic Preservation Law (New York State Historic Preservation Act of 1980 or "SHPA") "is required to complete the permit applications for the proposed SMI Valley Infill landfill expansion project" (NYSCEF Doc. No. 15). DEC directed SMI to submit the OPRHP determination to DEC as soon as it becomes available. Looking to SMI's application to modify its emissions permit, DEC directed SMI to:

> [P]rovide sufficient information for the Department to determine whether the Valley Infill project, if permitted, and the nearby Seneca Energy II, LLC Landfill Gas-to-Energy facility ("SE II facility") would be under "common control" as that term is used in ECL 19-0107(10) and 6 NYCRR 201- 2.1(b)(21), and therefore should be regulated as a single source of air emissions under one Air Title V permit (NYSCEF Doc. No. 15).

Haley stated that after this notice was provided, on May 17, 2024, Seneca Meadows submitted a response and supplement addressing the issues identified in DEC's notice. Haley maintained that this submission is currently under DEC review.

In support of dismissal, SMI argues that plaintiffs request is not justiciable because it is not ripe, and plaintiffs have not exhausted their administrative remedies. SMI emphasizes that DEC's review of the permit renewal and modification application is still ongoing, as DEC still has to

review the potential environmental impacts, "provide additional opportunities for public comment, and decide whether to deny the application or grant the permit" (NYSCEF Doc. No. 27).

In opposition, plaintiffs argue that if the Court finds "that a constitutional violation exists, it has authority to issue an injunction to remedy that violation" (NYSCEF Doc. No. 29, citing *Matter of New York Charter Schools Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120 [2009]). Plaintiffs emphasize that they are not challenging DEC's permitting decision in the context of an Article 78 proceeding, they are alleging that the Landfill's odors and gull infestation are violating plaintiff's constitutional rights. Plaintiffs argue that they do not have to wait until a permitting decision on the proposed Landfill expansion has been reached to raise claims that their constitutional rights are being actively violated. Plaintiffs stress that any permitting decision made by DEC on SMI's application to expand the Landfill would not "prevent" or "significantly ameliorate" the alleged harm caused by the Landfill (NYSCEF Doc. No. 29).

In reply, DEC notes that this argument made by plaintiffs was recently rejected by the Fourth Department's recent decision in *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217, 1219 [4th Dep't 2024], issued on July 26, 2024 ("*Fresh Air*"). DEC then emphasizes that the Court lacks the authority to issue declaratory judgment on matters which are unripe for judicial review (NYSCEF Doc. No. 33, citing *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 518 [1986]; *Matter of Vaughan v. New York State Dept. of Transp.*, 223 A.D.3d 1010, 1012 [3d Dep't 2024]). DEC further argues that plaintiffs' request to enjoin DEC's permit application review of SMI's landfill expansion request "seeks to prevent odors that plaintiffs predict will result from *future*, expanded landfill activities" (NYSCEF Doc. No. 33), which are speculative predictions about harm that "may be prevented or significantly ameliorated by further administrative action" (NYSCEF Doc. No. 33, quoting *Church of St. Paul & St. Andrew v.*

*Barwick*, 67 N.Y.2d at 520). In reply, SMI reiterates that its permit application is ongoing and thus plaintiff's request for injunctive relief of DEC's application review is premature.

In its sur-reply, plaintiffs argue that DEC fails to acknowledge that if SMI's present operation of the Landfill violates plaintiffs' constitutional rights, "the grant of a 15- year extension of SMI's permit to continue them would, likewise, violate those rights" (NYSCEF Doc. No. 36). Plaintiffs state if a finding of unconstitutionality was made by the Court, there would be no reason for DEC's consideration of an expansion of the Landfill because DEC lacks the authority to permit unconstitutional acts. Plaintiffs state that if the Court were to find that DEC could not be enjoined "from issuing a permit for an activity that would result in a violation of Green Amendment rights" it would render the Green Amendment "toothless by…disallowing both claims seeking to (i) prevent issuance of permits that would result in a violation of Green Amendment rights, and (ii) prevent enforcement of permits that were previously issued under which a violation of Green Amendment rights has already occurred" (NYSCEF Doc. No. 36).

In evaluating the ripeness of a controversy alleged, the Court must " 'determine whether the issues tendered are appropriate for judicial resolution, and…to assess the hardship to the parties if judicial relief is denied' " (*Sullivan v. New York State Joint Commn. on Pub. Ethics*, 207 A.D.3d 117, 130-131 [3d Dep't 2022], quoting *Church of St. Paul & St. Andrew v. Barwick,* 67 N.Y.2d at 519 [further citations omitted]). In a declaratory judgment action, the Court of Appeals stated that "the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Church of St. Paul and St. Andrew v Barwick*, 67 N.Y.2d at 520; *see Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190 [3d Dep't 2012]). "If the anticipated harm is insignificant, remote or contingent…the controversy is not ripe" (*Church of St. Paul and St. Andrew v. Barwick,*

67 N.Y.2d at 520 [internal citation omitted]; *see Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL–CIO v. Cuomo,* 64 N.Y.2d at 240; *Sullivan v. New York State Joint Commn. on Pub. Ethics*, 207 A.D.3d at 131). Stated differently, "if the claimed harm 'is contingent upon events which may not come to pass, the claim ... is nonjusticiable as wholly speculative and abstract' " (*Matter of Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d at 190, quoting *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL–CIO v. Cuomo,* 64 N.Y.2d at 240).

Based on the foregoing, the Court finds that plaintiff's request to enjoin DEC's review of SMI's permit application review is not ripe for judicial review, as DEC's review of SMI's applications is still ongoing. Plaintiffs argue that if the Court found that SMI's present operation of the Landfill violates plaintiffs' constitutional rights, the grant of a 15- year extension of SMI's permit will continue to violate those rights. The Court finds that this argument is without merit, as it is not known if the permit application will be approved by DEC. Moreover, the anticipated harm caused by DEC's continued permit review is insignificant to plaintiffs, who concede that if the Court were to find that the odors and vectors caused by the Landfill violated plaintiffs' constitutional rights, "there would be no reason for DEC's consideration of an expansion" as DEC lacks the authority to allow an unconstitutional act to continue (see *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d at 520; *Sullivan v. New York State Joint Commn. on Pub. Ethics*, 207 A.D.3d at 131). Plaintiffs fail to demonstrate how the potential unnecessary nature of DEC's ongoing review would cause irreparable harm in the absence of injunctive relief, or would prejudice plaintiffs in any way if the review were permitted to continue. It is not known if DEC will grant a 15- year extension of SMI's permit, and the alleged harm of continuing odors and vectors from the Landfill's use in the event that the applications from SMI are granted by DEC is

both wholly speculative and abstract at this stage. Accordingly, the Court grants defendants' motions which seek to dismiss plaintiffs' request to enjoin DEC's ongoing permit application review as unripe for judicial review.

IV. <u>Green Amendment Claims</u>

Turning to plaintiffs' remaining claims, plaintiffs seek declaratory relief against both DEC and SMI for their alleged violation of the Green Amendment. Within plaintiffs' third cause of action, they allege that because SMI can only operate the Landfill pursuant to a permit issued by DEC, the Landfill's source of authority comes from the State. Plaintiffs further argue that DEC's "regulation, oversight, and onsite monitoring of the Landfill constitutes meaningful participation in the Landfill's operation" and that SMI's actions and omissions are "so intertwined with governmental policies and are so governmental in nature that they constitute governmental action" (NYSCEF Doc. No. 2). Within plaintiffs' fourth cause of action, they allege that although DEC has the authority to enforce against SMI for violations of 6 NYCRR and SMI's Title V Permit, DEC failed to enforce these requirements, allowing SMI to cause "persistent and noxious odors to migrate from the Landfill in such quantity, characteristic, and duration that such emissions have and continue to unreasonably interfere with the comfortable enjoyment of life or property, in violations [sic] of Plaintiffs' right to clean air and a healthful environment under the Green Amendment" (NYSCEF Doc. No. 2).

*A. SMI – State Action*

In support of dismissal of plaintiff's third cause of action, SMI argues that the Green Amendment only applies to the State and its agencies, and "cannot be used to challenge the actions of private parties" (NYSCEF Doc. No. 27). SMI emphasizes that plaintiffs fail to offer any factual

allegations sufficient "to equate SMI's operation of its Landfill with State action" (NYSCEF Doc. 27). Plaintiffs did not directly address this argument in their initial opposition papers.

On July 26, 2024, the Fourth Department issued the first appellate decision addressing, in part, whether a Green Amendment claim can be used to challenge the actions of a private party (*see Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217 [4th Dep't 2024], *appeal dismissed* 2025 NY Slip Op 62541 [Ct. App. Feb. 13, 2025]) ("*Fresh Air*"). In *Fresh Air*, plaintiff Fresh Air for the Eastside, Inc. commenced an action against New York State, DEC (collectively "State defendants"), Waste Management of New York, LLC ("WM"), and the City of New York seeking declaratory and injunctive relief. Fresh Air for the Eastside Inc., "a non-profit corporation comprised of over 200 members who reside within four miles of the landfill, was formed to address odors and fugitive emissions resulting from WM's allegedly inadequate operation of the landfill" (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1217). Within plaintiff's single cause of action, it alleged that "[t]he continuing emissions of Odors and Fugitive Emissions by the Landfill violate the constitutionally protected, affirmative rights of the Members to 'clean air...and a healthful environment' " (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). Plaintiff Fresh Air sought, in part, judgment declaring that WM's actions and omissions in the operation of the landfill "are violating Plaintiff's constitutional rights under the Green Amendment...by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact on climate change" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 30).

In reply to plaintiffs' opposition, DEC recognized this decision, stating that in *Fresh Air* the Fourth Department rejected the "plaintiff's similar assertion that it could proceed on the

allegation that it was 'difficult to discern' whether the private landfill owner or the State 'control[led] the operations' of the challenged landfill" (NYSCEF Doc. No. 33). In SMI's reply, they allege that "*Fresh Air* found that a landfill operator cannot be liable" under the Green Amendment, by acknowledging that " 'the fact that landfill operation is a regulated industry' does not transform its conduct into State action" (NYSCEF Doc. No. 34, quoting *Fresh Air*, 229 A.D.3d at 1218).

Oral argument was held on November 22, 2024, addressing the impact of this decision on the pending motions to dismiss. The Court permitted plaintiffs to file a sur-reply addressing this recent development of the law. In plaintiffs' sur-reply, they argue that the Fourth Department in *Fresh Air* did not preclude a Green Amendment claim from ever being brought against a private party; it merely found that a Green Amendment claim could not be asserted against the private defendant in that instance, because plaintiff failed "to establish that the State's involvement with that private conduct rose to the level of 'significant State involvement' " (NYSCEF Doc No. 35, quoting *Fresh Air*, 229 A.D.3d at 1218). Plaintiffs maintain that they sufficiently pled facts to support the conclusion that the State has significant involvement with the Landfill and its operations.

Looking to the Complaint, plaintiffs alleged that DEC installed an onsite monitor at the Landfill as a special condition stated within DEC's renewal of SMI's waste permit to control the nuisance odors from the Landfill (NYSCEF Doc. No. 35, citing Compl. ¶ 55). Plaintiffs argue that DEC's "tracking and oversight" of the Landfill's odors "is done at such a granular level" that DEC "goes as far as maintaining daily reports in which it marks down whether that day's odors were actually inspected by SMI employees" (NYSCEF Doc. No. 35, citing Compl. ¶ 58). Looking to these actions, plaintiffs contend that any action that SMI takes or fails to take to address the odors

from the Landfill is "not the product of closed-door, private decision making" but rather, "the result of [an] ongoing dialogue, collaboration and involvement" with DEC, to the extent that such actions are "State sanctioned" (NYSCEF Doc. No. 35). Plaintiffs further argue that they have demonstrated that the State's involvement is significant, and arguably "irregular when compared to other regulated landfills in the State" (NYSCEF Doc. No. 35).

The Court of Appeals clearly states that "[a] State Constitution is a document defining and limiting the powers of State government, not a blueprint for the judiciary to turn what it perceives to be 'desirable' social policies into law" (*SHAD All. V. Smith Haven Mall*, 66 N.Y.2d 496, 504 [1985] [citations omitted]). With this intended scope in mind, the Court of Appeals emphasized that the New York State Constitution was only intended "to govern the rights of citizens with respect to their government and not the rights of private individuals against private individuals" (*id.* at 503). The Fourth Department reiterated this limitation in *Fresh Air*, stating that "the Green Amendment only governs the rights of citizens with respect to their government and not the rights of private individuals against private individuals" (*Fresh Air*, 229 A.D.3d at 1218). To determine whether private conduct can be considered State action within the meaning of our Constitution, the Court must consider the following factors:

> "[T]he source of authority for the private action; whether the [S]tate is so entwined with the regulation of the private conduct as to constitute [S]tate activity; whether there is meaningful [S]tate participation in the activity; and whether there has been a delegation of what has traditionally been a [S]tate function to a private person" (*Baskin v. Mabco Tr., Inc.*, 176 A.D.3d 1539, 1543 [3d Dep't 2019], *appeal dismissed* 35 N.Y.3d 977 [2020], quoting *SHAD All. V. Smith Haven Mall*, 66 N.Y.2d at 505).

The Fourth Department recognized these factors in *Fresh Air*, and emphasized that because this test "is not simply State involvement, but rather significant State involvement, satisfaction of one of these criteria may not necessarily be determinative to a finding of State action" (*Fresh Air*, 229

A.D.3d at 1218). In that case, looking to plaintiff's allegations, the Fourth Department found that "the fact that landfill operation is a regulated industry and that WM's customers are predominantly municipal entities is insufficient to impute state action to WM's conduct" (*id.*).

Applying these principles, the Court finds that plaintiffs failed to plead factual allegations sufficient to demonstrate significant State involvement with SMI's operation of the Landfill to impute state action to SMI's conduct. Within the Complaint, plaintiffs alleged that when DEC renewed SMI's waste management permit, it installed an onsite monitor at the Landfill as one of "seven new special conditions intended to control the nuisance odors from the Landfill" (NYSCEF Doc. No. 2; Compl. ¶ 55). Plaintiffs alleged that the monitor "indicated on Daily Inspection Reports...when SMI employees were reportedly confirming citizen odor complaints in and around Seneca Falls and Waterloo" (NYSCEF Doc. No. 2; Compl. ¶ 58). Pursuant to 6 NYCRR 621.10, when DEC issues a final permit, DEC may impose conditions to the issuance of a final permit which differ from the conditions in the draft permit (*see* 6 NYCRR 621.10[e]; *see generally Matter of Beer v. New York State Dept. of Envtl. Conservation*, 189 A.D.3d 1916, 1918 [3d Dep't 2020]; *Matter of Benali, LLC v New York State Dept. of Envtl. Conservation*, 150 A.D.3d 986, 987 [2d Dep't 2017], *lv denied* 30 N.Y.3d 911 [2018]). Plaintiffs do not explain how DEC's imposition of new special conditions to SMI's waste permit renewal goes beyond its ordinary regulatory authority, and fails to specify how DEC's decision to monitor SMI employee receipt of citizen odor complaints constitutes meaningful State participation in the operation of the Landfill or SMI's control of the Landfill's odors. Moreover, DEC has not delegated any authority to SMI in the operation of the landfill that has traditionally been a state function. Although plaintiffs argue that they have demonstrated that the State's involvement is significant, and arguably "irregular when

compared to other regulated landfills in the State" (NYSCEF Doc. No. 35), plaintiffs failed to include factual allegations within its pleadings to support this contention.

Therefore, the Court finds that plaintiffs failed to plead factual allegations sufficient to impute DEC's actions to SMI's private operation of the Landfill. Under these circumstances, plaintiffs, who are private parties, cannot assert a claim against SMI, another private party, for its alleged violation of plaintiff's constitutional rights under the Green Amendment (*see Fresh Air*, 229 A.D.3d at 1218). Accordingly, the Court grants defendants' motions to dismiss plaintiffs' third cause of action for declaratory judgment and injunctive relief against SMI.

*B. DEC – Discretionary Authority*

In support of dismissal of plaintiffs' fourth cause of action, DEC argues that plaintiffs lack the authority to compel DEC to take enforcement steps against SMI, and emphasize that the Green Amendment does not alter DEC's enforcement discretion provided to DEC by New York's Environmental Conservation Law ("ECL"). DEC states that the legislature afforded discretionary authority to DEC "to enforce its enabling act, regulations, and permits" (NYSCEF Doc. No. 9). DEC argues that the Court only has the authority to compel the actions of an administrative agency when the duties are "ministerial" in nature and require no "exercise of judgment or discretion" (NYSCEF Doc. No. 9, quoting *Matter of Brusco v. Braun*, 84 N.Y.2d 674, 679 [1994]). DEC recognizes that a court's authority to issue a declaratory judgment is a distinct authority from its authority to compel executive action, yet emphasizes that both authorities provided to the Court are "bound by the doctrine of separation of powers" (NYSCEF Doc. No. 9). DEC argues that this means that Courts should not issue determinations which "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (NYSCEF Doc. No. 9, quoting *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535-536 [1984]). DEC claims that

plaintiffs' relief is thus constitutionally barred, "because judicial exercise of DEC's enforcement discretion would 'violat[e] . . . fundamental principles of separation of powers' " (NYSCEF Doc. No. 9, quoting *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 [1987]).

DEC maintains that it "is able to consider the full scope of its regulatory obligations when it prioritizes enforcement efforts based on 'the ever-shifting public-safety and public-welfare needs' of the State" (NYSCEF Doc. No. 9, quoting *Texas v. United States*, 599 U.S. 670, 680 [1964]). DEC stresses that if plaintiffs can compel DEC enforcement in the exercise of its regulatory obligations, "then plaintiffs and courts, rather than DEC, will set DEC's enforcement priorities...[a]nd they will do so based on individual lawsuits rather than an informed assessment of environmental priorities and enforcement needs across the State" (NYSCEF Doc. No. 9). DEC argues that nothing in the Green Amendment's text or legislative history places an affirmative obligation on the government in a manner which would abrogate DEC's enforcement discretion. DEC states that the Green Amendment, like the other rights enumerated in the Bill of Rights, provides protection to individuals against government infringement.

In opposition, plaintiffs argue that the Complaint does not seek DEC enforcement, but rather, declaratory judgment stating that DEC is violation plaintiffs' constitutionally protected rights under the Green Amendment. Plaintiffs argue that compliance with the Constitution is not optional and thus cannot be considered to be discretionary in nature (NYSCEF Doc. No. 29, citing D.J.C.V., v. USA, 2022 WL 1912254, at *16 [S.D.N.Y. June 3, 2022]; *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 655 [1969]). Plaintiffs maintain that if the Court finds a Constitutional violation, the Court "has the authority to restrict any action that would result in a continuation of such violation" (NYSCEF Doc.no. 29, citing *Matter of New York Charter Schools Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 133 [2009]).

In reply, DEC argues that the Fourth's Department's holding in *Fresh Air* is directly on point in this matter. According to DEC, the Fourth Department held that "a plaintiff fails to state a Green Amendment cause of action for declarations and injunctions based on DEC's alleged failure to enforce against a landfill for odors" (NYSCEF Doc. No. 33). DEC states that the Complaint similarly alleges that DEC violated plaintiffs' rights under the Green Amendment by "failing 'to bring enforcement against' [SMI] for alleged landfill odors" (NYSCEF Doc. No. 33, quoting Complaint ¶¶ 68, 99-100, 103). DEC notes that plaintiff's allegation that DEC violates plaintiffs' right under the Green Amendment by "allowing the [l]andfill to operate" (NYSCEF Doc. No. 29) is indistinguishable from the *Fresh Air* plaintiff's argument that DEC violated plaintiff's rights under the Green Amendment by ""'acquiesc[ing] to the continued operation" of the landfill (NYSCEF Index No. 23-00179, Doc. No. 45 [Fresh Air Plaintiff's Br.] at 35). DEC noted that plaintiffs' attempt to distinguish its claim as one for declaratory relief is without merit, as the Fourth Department stated that although the complaint "ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus, seeking to compel the State to take enforcement action against a private entity" *(Fresh Air*, 229 A.D.3d at 1219 [internal quotation marks and citations omitted]).

Plaintiffs maintain that their claim for injunctive relief is not essentially a request for mandamus to compel, because plaintiffs do not seek to compel any enforcement action from DEC. Plaintiffs state that unlike plaintiffs in *Fresh Air*, they do not seek an order compelling DEC to remedy SMI's current activities by taking enforcement action against SMI, but rather, an order enjoining DEC from granting SMI's permit seeking an expansion of the landfill, "which would otherwise have to cease operations no later than December 31, 2025" (NYSCEF Doc. No. 35). Plaintiffs argue that the injunction would "flow[] naturally from the declaration" on plaintiffs'

constitutional rights under the Green Amendment because "where ongoing activities are actively violating Plaintiffs' constitutional rights, the expansion of said activities is impermissible" (NYSCEF Doc. No. 35).

The Court finds that the controlling precedent set forth in *Fresh Air* applies to plaintiffs' fourth cause of action which seeks declaratory judgment and injunctive relief against DEC. In *Fresh Air*, plaintiff alleged that "[t]he continuing emissions of Odors and Fugitive Emissions by the Landfill violate the constitutionally protected, affirmative rights of the Members to 'clean air…and a healthful environment' " (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). The complaint further alleged that "[t]he State has failed to adequately use its enforcement powers to cause [WM] to control the Odors and Fugitive Emissions at the Landfill" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). Due to this alleged constitutional violation, the complaint sought, among other things, a Court order:

> (1) [D]eclar[ing] [that] Defendants are violating Plaintiff's constitutional rights under the Green Amendment in Article I §19 of the New York State Constitution to clear air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact on climate change; and
> (2) [O]rdering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community
>
> *Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 30.

In the instant action, plaintiffs allege that by failing to enforce the provisions of 6 NYCRR § 360.19(i), and the requirements of law, rules, regulations and Condition 28 of SMI's Title V Permit:

> [DEC] has allowed persistent and noxious odors from the Landfill which substantially and unreasonably interfere with Plaintiffs' comfortable enjoyment of life or property, constituting a nuisance, in violation of Plaintiffs' right to clean air and a healthful environment under the Green Amendment (NYSCEF Doc. No. 2; Compl. ¶¶ 100, 104).

Plaintiffs allege that as a result of this constitutional violation, plaintiffs seek (1) "a declaratory judgment that [DEC's] actions and failures to act violate Plaintiffs' right to clean air and a healthful environment guaranteed by the Green Amendment" and (2) an injunction preventing DEC "from issuing a permit for the Landfill Expansion" (NYSCEF Doc. No. 2; Compl. ¶ 107).

The Court finds that as with plaintiff's complaint in *Fresh Air*, plaintiffs in this action seek declaratory relief stating DEC's actions and failures in controlling the odors from the Landfill violate plaintiffs' right to clean air and a healthful environment guaranteed by the Green Amendment. The Fourth Department unambiguously stated that this type of declaratory relief "is essentially a CPLR article 78 proceeding in the nature of mandamus," because it is "seeking to compel the State to take enforcement action against a private entity" (*Fresh Air*, 229 A.D.3d at 1219). The Fourth Department specifically noted:

> [T]he only conduct on the part of State defendants that the complaint alleges violates the constitutional right of plaintiff's members to clean air and a healthful environment is their regulatory failure to take enforcement actions against WM based on its allegedly inadequate operation of the landfill (*Fresh Air*, 229 A.D.3d at 1219-1220 [internal quotation marks and citations omitted]).

The Fourth Department found that in making this allegation against DEC, plaintiff failed to state a cause of action against State defendants, because the court cannot impose mandamus relief "to compel an act in respect to which the [administrative agency] may exercise judgment or discretion...such as an enforcement proceeding" (*Fresh Air*, 229 A.D.3d at 1220 [internal quotation marks and citations omitted]). As with plaintiff in *Fresh Air*, the only DEC conduct the Complaint in this action alleges violates plaintiffs' constitutional rights is DEC's failure to enforce the provisions of 6 NYCRR § 360.19(i), 6 NYCRR § 211.1, and Condition 28 of SMI's emissions permit against SMI based upon based on its allegedly inadequate operation of the Landfill. While plaintiffs do not seek to compel DEC to remedy SMI's current activities by taking enforcement

action against SMI, they seek declaratory relief which, if granted, would mandate DEC's denial of SMI's pending permit application. Moreover, the Court notes that the Fourth Department's holding in *Fresh Air* was not limited to enforcement proceedings, and included any relief for mandamus relief which would compel "an act in respect to which the [administrative agency] may exercise judgment or discretion" (*Fresh Air*, 229 AD3d at 1220 [internal quotation marks and citations omitted]). Therefore, the Court agrees with defendants that the guiding precedent in *Fresh Air* applies to the instant matter, and finds that plaintiffs fail to state a cause of action against DEC. Accordingly, the Court grants defendants' motions to dismiss plaintiffs' fourth cause of action for declaratory and injunctive relief against DEC.[2]

V. Conclusion

Based on the foregoing, the Court denies the portion of SMI's motion which seeks to dismiss plaintiffs' first cause of action for private nuisance, grants the portion of SMI's motion which seeks to dismiss plaintiffs' second cause of action for public nuisance, and grants defendants' motions to dismiss plaintiffs' third and fourth causes of action for declaratory and injunctive relief.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this decision.

Accordingly, it is hereby

**ORDERED**, that SMI's motion to dismiss plaintiffs' first cause of action for private nuisance is denied; and it is further

**ORDERED**, that SMI's motion to dismiss plaintiffs' second cause of action for public nuisance is granted; and it is further

[2] While the Court recognizes SMI's argument that the Green Amendment is not self-executing, the Court finds that the Court need not reach this constitutional issue (*see Matter of Clara C. v. William L.*, 96 N.Y.2d 244, 250 [2001]).

**ORDERED**, that plaintiffs' second cause of action is dismissed; and it is further

**ORDERED**, that defendants' motions to dismiss plaintiffs' third cause of action for declaratory judgment and injunctive relief against SMI is granted; and it is further

**ORDERED**, that plaintiffs' third cause of action is dismissed; and it is further

**ORDERED**, that defendants' motions to dismiss plaintiff's fourth cause of action which sought declaratory judgment, an injunction on DEC's review of SMI's permit application, and an injunction against the grant of SMI's permit application is granted; and it is further

**ORDERED**, that that plaintiffs' fourth cause of action is dismissed; and it is further

**ORDERED**, that the Complaint is dismissed against defendant DEC; and it is further

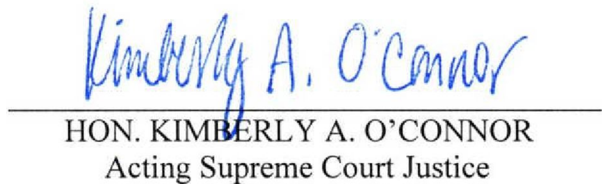
**ORDERED**, that the parties shall appear for a ***virtual conference*** on ***April 3, 2025 at 10:30 a.m.***, to discuss the status of plaintiffs' remaining cause of action for private nuisance against SMI.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those Rules with respect to filing, entry, service, and notice of entry of the original Decision and Order.

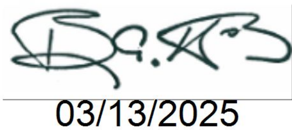
**SO ORDERED**.

**ENTER**.

Dated: March 13, 2025
Albany, New York




HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice



03/13/2025

Papers Considered:

1. Summons, dated March 25, 2024; Complaint, dated March 25, 2024;
2. DEC's Notice of Motion to Dismiss, dated May 31, 2024; Memorandum of Law in Support of Motion, dated May 31, 2024; Affidavit of Thomas P. Haley in Support of Motion, sworn to May 30, 2024, with Exhibits A-F annexed;
3. SMI's Notice of Motion to Dismiss, dated May 31, 2024; Affirmation of Michael Murphy, Esq., in Support of Motion, dated May 31, 2024, with Exhibits 1-6 annexed; Memorandum of Law in Support of Motion, dated May 31, 2024;
4. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, dated July 12, 2024;
5. DEC's Memorandum in Reply, dated August 2, 2024;
6. SMI's Memorandum in Reply, dated August 2, 2024; *and*
7. Plaintiffs' Sur-Reply Memorandum of Law in Opposition to Defendants' Motions to Dismiss, dated August 9, 2024.