

**SUPREME COURT
STATE OF NEW YORK**

COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

**DECISION and ORDER
Index No. E2022000699**

vs.

**THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, THE CITY OF NEW YORK,
WASTE MANAGEMENT OF NEW YORK, L.L.C.,
Defendants.**

KNAUF SHAW LLP Linda R. Shaw, Esq., Alan J. Knauf, Esq., Dwight Kanyuck, Esq., William F. Kellermeyer, Esq. and Melissa Valle, Esq., of Counsel, Attorneys for Petitioner HARRIS BEACH PLLC, Kelly S. Foss, Esq. Steven P. Nonkes, Esq. Frank C. Pavia, Esq. Allison B. Fiut, Esq. of Counsel, Attorneys for Respondent Waste Management of New York, LLC

LETITIA JAMES Attorney General State of New York, Mihir A. Desai, Esq. Assistant Attorney General Attorney for defendants The State of New York and New York State Department of Environmental Conservation (“NYSDEC”) (together “the State”).

HEISMAN NUNES and HULL LLP Ronald G. Hull, Esq. of Counsel, Attorneys for Defendant The City of New York

ARK, J.

PRELIMINARY STATEMENT

The “Members” of **Plaintiff Fresh Air for the Eastside, Inc.**¹ (“FAFE” or “Plaintiff”) are residents in the Town of Perinton, New York, who claim their recently acquired constitutional “right[s] to clean air and water and a healthful environment” are being violated as a result of the actions or inactions on the part of the Defendants regarding the High Acres Landfill²

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

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

(“the Landfill”) in the adjacent Towns of Perinton and Macedon, New York.³

The Green Amendment.

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

On November 2, 2021, New York State voters⁴ overwhelmingly passed a ballot measure adding the Green Amendment to the State Constitution. It was approved at a time when comprehensive laws, regulations, and policies already existed that regulate air and the environment, and was enacted despite the existing laws of the State of New York which created the New York State Department of Environmental Conservation (“NYSDEC”) with the purpose to “conserve, improve and protect [New York’s] natural resources and environment.” (Environmental Conservation Law (“ECL”) §§ 1-0101, 3-0101).

The New York State Constitution is the blueprint of governance in the state. All laws, regulations, and state actions must be consistent with the provisions in the Constitution. Notably, this new right to clean air and a healthful environment was not placed into the Environmental Conservation Law by the Legislature, rather it was placed in the Bill of Rights of the Constitution. As a result of the new constitutional right to clean air, FAFE’s Complaint raises novel legal issues, as a matter of first impression for this Court.

The Parties.

The Defendant Waste Management of New York, L.L.C. (“WMNY”)⁵ owns and

³This lawsuit does not include the extensive portion of the landfill in the Town of Macedon, Wayne County, which would presumably continue to operate if the Perinton, Monroe County, portion was closed.

⁴ Votes in:	Yes	No	Blank	Void	Total	Yes % of Total
Perinton	9,209	3,988	398		13,595	67.7
Monroe County	94,871	44,065	6,761	24	145,721	65.1
Total NYC	754,132	157,665	237,375	0	1,149,172	65.6
Statewide	2,129,051	907,159	404,006	894	3,441,110	61.9

⁵ WMNY is a Delaware limited liability company authorized to do business in New York, with offices located at 425 Perinton Parkway, in the Town of Perinton, County of Monroe and

operates the Landfill, which accepts and disposes of mostly Municipal Solid Waste (“MSW”) generated by the Defendant City of New York (“NYC”) and transported to the Landfill via rail.

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

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

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

Plaintiff’s Complaint.

Plaintiff complains that WMNY has acted jointly and/or in concert with the State and

State of New York.

NYC, and with the approval of NYSDEC, to operate the Landfill in a manner that results in the Odors and Fugitive Emissions which deprive Members of their right under the Green Amendment to clean air and a healthful environment, to wit:

The current and future liability of the Defendants arise each in part from their continued aggregate, cumulative actions and failures to live up to the statutory goals and policies of reducing the amount of waste disposed, which would reduce greenhouse gasses (“ GHGs”). See Complaint ¶ 165.

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

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

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

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

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

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

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

NYC has also failed to properly incentivize recycling within the five boroughs of NYC, and instead prefers to simply ship NYC garbage to the Landfill and other landfills in Central and Western New York. See Compl. ¶ 161.

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

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

Requested Relief.

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

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

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

Accordingly, Plaintiff requests this Court award the following relief:

(1) declare the Defendants are violating Plaintiff’s constitutional rights under the Green

Amendment in Article I §19 of the New York State Constitution to clean air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact of climate change; and

(2) ordering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community; and

(3) granting such other further relief as this Court deems just and proper, including Plaintiff's costs, reasonable attorney's fees, and disbursements pursuant to CPLR Article 86.

Facts as set forth by Petitioner.⁶

A. The Landfill.

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

The Landfill has been in operation since about 1972, at which time it was much smaller in size and did not ship in waste by rail. When the rail transportation of waste from NYC commenced in about 2015, serious problems began. The Landfill is governed by numerous permits issued by the State and other government agencies, including for example, its 6 N.Y.C.R.R. Part 360 Solid Waste Management Facility Permit (the "Landfill Permit") and Title V Clean Air Act Permit (the "Air Permit") (together, the "Permits"). The Landfill Permit expires on July 8, 2023, and the Air Permit expired on December 1, 2021.⁷

⁶ On a CPLR § 3211 motion to dismiss, "[a]ny facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff." *Gibraltar Steel v. Gibraltar Metal Proc.*, 19 A.D.3d 1141, 1142 (4th Dep't 2005).

⁷ On March 10, 2022, Petitioner requested by an Amended Petition various actions taken by the Town of Perinton, Town of Perinton Zoning Board of Appeals, and WMNY be vacated, annulled and/or declared illegal, unconstitutional, invalid, arbitrary, capricious, null and/or void. Index No. E2021008617. Included in the Amended Petition are challenges to these permits.

The Landfill Permit was modified in 2013 to allow WMNY to construct and operate a rail siding to manage waste brought to the Landfill via intermodal rail from NYC, and since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts for disposal. In fact, beginning in mid-2015, rates of NYC Garbage brought to the Landfill by rail caused the total MSW disposed to increase by more than 250%, and NYC garbage currently represents about 90% of all MSW disposed at the Landfill.

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

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

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

Since the FAFE App was created in 2017, through January 4, 2022, it has logged over 23,670 complaints of Odors and Fugitive Emissions, over a wide-spread area around the Landfill. Compl. ¶ 52. At least 99 of those complaints were made after January 1, 2022. Compl. ¶ 52. NYSDEC has logged at least 2,626 complaints of Odors and/or Fugitive Emissions. Compl. ¶ 55.

The Odor and Fugitive Emissions are continuing in nature. Compl. ¶ 10. FAFE Members are not only exposed to Odors and/or Fugitive Emissions when they are outside in public spaces or in their own backyards, but also inside their private residences since the gasses contaminate the indoor air in their homes. Compl. ¶ 135. Members are not only concerned with Fugitive Emissions (which NYSDEC does not require WMNY to monitor on a frequent and continuous basis) that pollute their air, but also with the impacts large GHG emitters like the Landfill will have on climate change and their environment, especially because WMNY admits that changes to weather conditions interfere with its ability to properly operate the Landfill and control the Odors and Fugitive Emissions emanating from the Landfill. Compl. ¶ 148.

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

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

A misapplication of the current and ineffective laws and regulations cause Defendants to fail to protect FAFE and its Members against the Odors/Fugitive Emissions. The State has failed to properly take any meaningful and proper action to uphold or enforce the applicable laws and regulations. WMNY claims it has tried to mitigate the Odor/Fugitive Emissions problem within the confines of its existing Permits and the existing State laws and regulations.⁸ Odors/Fugitive Emissions, which are causing unclean air and an unhealthful environment, persist (Compl. ¶ 57).

D. New York City.

The Landfill’s majority waste generator is New York City(Compl. ¶ 4. NYC), pursuant

⁸This Court recognized the applicability of the Hierarchy to the Landfill in *Preserve Scenic Perinton Alliance, Inc. v. Porter*, 32 Misc. 3d 1216(A) (Sup. Ct. Monroe Co. 2010.) (“Consistent with ECL § 27-0106, a [Waste-to-Energy] facility would be preferred to a landfill, a position not lost on the DEC”).

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

E. Summary.

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

The regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right. By the plain meaning of its very simple terms, the newly enacted Green Amendment allows the People of the State of New York the right to be free from unclean air and water and an unhealthful environment. Those rights would be meaningless if they could not seek redress for violations.

Defendants’ motions to dismiss the Complaint.

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

and proper.

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

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

Plaintiff’s Opposition.

Motion #3: WMNY’s Motion to Dismiss.

Defendants WMNY (Motion #3) and NYC (Motion #1), but not the State, argue that the Green Amendment is not self-executing and cannot be enforced by a private party. FAFE counters that if the Green Amendment does not allow one private party to sue another private party whose actions are so entwined with governmental policies or so impregnated with a governmental character that it can be regarded as governmental action, then the Green Amendment is meaningless as an impediment to polluters. WMNY has acted jointly and/or in concert with the State and NYC, and with the approval of NYSDEC, to operate the Landfill in a manner that results in the Odors and Fugitive Emissions which may deprive Members of their right to clean air and a healthful environment. Compl. ¶ 164.

In their memoranda of law, Defendants NYC and WMNY set forth the possible speculative effects the Green Amendment would have on private parties and the already regulated community should this new constitutional right be found to be self-executing and enforceable by a private cause of action by this Court. FAFE counters that if private parties are in compliance with applicable environmental state laws and regulations, have valid permits issued by NYSDEC, and are not causing any environmental harm, they may not need to fear the Green Amendment. FAFE counters that citizens may sue when their constitutional rights, specifically rights embodied in the Bill of Rights, are infringed upon. See *Brown v. State*, 89 N.Y.2d 172 (1996). The Green Amendment merely created a new right: the right to clean air and a healthful environment. FAFE asserts that its claims against each of the Defendants are valid and its complaint should not be dismissed.

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

“The general rule is that constitutional provisions are presumptively self-executing. See *Brown v. State*, 89 N.Y.2d 172, 186 (1996) (citing *People v. Carroll*, 3 N.Y.2d 686 (1958)).⁹ In contrast to the constitutional provisions... which explicitly reference further action by the legislature, there is no mention in the text of the Green Amendment of involvement of the legislature or legislative process as a predicate to implementation. Consequently, based on the plain text, it would seem that the Green Amendment is enforceable without additional legislation...

The Amendment allows enforcement against the government, this much is unambiguous. It appears less likely that the courts will allow an action to prevent pollution to be brought directly against private entities under the Green Amendment. A comparison with several other provisions of the New York State Constitution informs this view. Article I, Section 11 provides that “No person shall because of race, color, creed or religion be subjected to any discrimination in his or her civil rights *by any other person or any firm, corporation, or institution*, or by the state or any agency or subdivision of the state.” (Emphasis added). In contrast, Article I, section 3, pertaining to the free exercise of religion, and Article I, section 8, protecting freedom of the press, make no reference to private entities and, with certain limited exceptions, have been found to impose a restriction only on the government.”

This Court agrees with this analysis that the Green Amendment makes no reference to private entities and grants WMNY’s Motion #3¹⁰ dismissing the Complaint pursuant to CPLR 3211

⁹*Brown v. State*, 89 N.Y.2d 172, 186 (1996). A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing, that is, it takes effect immediately, without the necessity for supplementary or enabling legislation (see generally, Friesen, State Constitutional Law ¶ 7.05 [1], quoting from Cooley, Constitutional Limitations [7th ed.]; 16 C.J.S., Constitutional Law, § 46). In New York, constitutional provisions are presumptively self-executing (see, *People v. Carroll*, 3 N.Y.2d 686, 691: “The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing”. (16 C. J. S., Constitutional Law, p. 144, and *693 cases there cited; see, also, 11 Am. Jur., Constitutional Law, § 75, p. 692.).

¹⁰ The landfill exists by the granting of governmental permits and regulation. This lawsuit may result in the closure of the landfill by court order and/or government action. One

(a) (7).

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

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

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

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

In its defense, the State lists the various changes it has caused WMNY to make at the Landfill. However, the Defendants have not properly remedied the on-going problem. In other words, despite the State's efforts, the Landfill is still causing Odors and Fugitive Emissions which plague the community. Therefore more needs to be done to protect FAFE's members' constitutional rights to clean air and a healthful environment.

The State concedes it is obligated to enforce the Permits "by law," but that it is entitled to full discretion and immunity from judicial review because its enforcement actions are "discretionary." FAFE has alleged more than just the State's failure to enforce the Permits

would think that WMNY would want to remain in the lawsuit to protect its interest. WMNY would certainly be a necessary party per CPLR § 1001. However, WMNY has removed itself from this lawsuit and may no longer have standing to challenge any action taken herein.

results in a violation of the Constitution, but rather that numerous and continuous acts and omissions of the Defendants result in the violation of the Constitution. Compl. ¶153. As detailed more in Point Three below, the State lacks the discretion to violate the Constitution.

The State fails to cite any binding authority mandating that FAFE pursue this action as a CPLR Article 78 proceeding, as opposed to a Declaratory Judgment action. FAFE's Complaint was properly pursued as one for a Declaratory Judgment because the reliefs it seeks are not available through CPLR Article 78. A declaration of constitutional rights is most appropriate in a declaratory judgment action, not a CPLR Article 78 proceeding. See *Bunis v. Conway*, 17 A.D.2d 207, 208 (4th Dep't 1962) ("It is the settled law that an action for a declaratory judgment will lie 'where a constitutional question is involved'"); *Parry v. County of Onondaga*, 51 A.D.3d 1385, 1387 (4th Dep't 2008); *Levenson v. Lippman*, 4 N.Y.3d 280, 287 (2005). Likewise, FAFE's relief for the Landfill to close or the Odors/Fugitive gases to be abated is proper in a declaratory judgment action. "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The discretion must be exercised judicially and with care." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations ... No limitation has been placed, or attempted to be placed, upon its use..." *Id.* [citations omitted]. Here, the method to "quie[t]" FAFE's dispute is to close the Landfill or cause the Defendants to abate the Odors/Fugitive Emissions. Regardless, even if this action is more appropriate in the form of a special proceeding, it should be converted and not dismissed. See CPLR § 103(c); *City of New York v. State Bd. of Equalization and Assessment*, 60 A.D.2d 932, 933 (3d Dep't 1978).

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

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

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

A. FAFE's Action Is Timely.

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

The governmental actions at issue here are what the State has and has not done since the enactment of the Green Amendment. The Green Amendment went into effect on January 1, 2022. The combined acts and omissions of the Defendants have resulted in the violation of the Constitution. Compl. ¶ 153. FAFE commenced this action on January 28, 2022, mere 27 days after the Green Amendment became effective. Therefore, FAFE has satisfied all applicable statutes of limitations, whether this action is treated as one for Declaratory Judgment or lies under Article 78. Regardless, constitutional violations are subject to the six-year statute of limitations under CPLR § 213. Therefore, FAFE's claims are not timebarred. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801 (2003).

B. FAFE did not fail to exhaust administrative remedies.

The State suggests that FAFE "may" petition NYSDEC to modify or revoke Permits on the ground that they violate the Green Amendment, then seek the relief stated in its Complaint

through NYSDEC's administrative permit review process, and only then "may" it seek judicial review pursuant to an Article 78 proceeding: 6 NYCRR §§ 621.13(a)(4), 621.13(b). Again, the State is merely making suggestions as to the different procedural avenues FAFE could have chosen. Indeed, any attempt by FAFE to exhaust its administrative remedies and first proceed pursuant to 6 NYCRR § 621.13 would be inappropriate because of the constitutional question at stake. NYSDEC has not been granted authority to make Constitutional determinations and is not better suited than this Court to determine whether a Constitutional violation has occurred. The Green Amendment was placed into New York's Bill of Rights, not the Environmental Conservation Law, and thus, this matter is within this Court's purview.

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

Here, the State must ensure that its citizens have the right to clean air and a healthful environment. Because the decision on whether or not to comply with the Constitution is nondiscretionary, the State's argument that mandamus is available only to force a public official to perform a ministerial duty enjoined by law is without merit. Complying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial. See *D.J.C.V.*, 2022 WL 1912254, at 16; *Finn's Liquor Shop*, 24 N.Y.2d at 655; *City of Yonkers*, 96 F.3d at 622. The violation continues until it is corrected. Contrary to the State's argument, it is unnecessary for the Green Amendment to "impose any mandatory duty on the State" because of the State's nondiscretionary obligation to comply with the Constitution. In fact, NYSDEC, as a state agency, has limited authority and has only been granted certain powers by the State Legislature. See ECL §§ 1-0101, 3-0101. It has not been granted the right to violate the Constitution. *New York Const. Materials Ass'n, Inc. v. New York State Dept. of Env'tl. Conservation*, 83 A.D.3d 1323 (3d Dep't 2011) (state agencies must not act beyond the powers granted to them by the Legislature).

Utilizing its enforcement authority is just one of the ways the State could respond to the Constitutional violation, but is not the sole option it has, and is not the sole basis for FAFE's Complaint. See Compl. ¶ 153. The State attempts to defend itself by listing the various changes it has forced WMNY to make at the Landfill. However, this only bolsters FAFE's Complaint; notably, that the situation at the Landfill has risen to a level which violates FAFE's constitutional rights of clean air and a healthful environment, and the Defendants have not

properly remedied the on-going problem. In other words, despite the State's efforts, the Landfill is still causing Odors and Fugitive Emissions which plague the community, therefore more needs to be done to protect FAFE's Members' constitutional rights to clean air and a healthful environment. The Green Amendment is clear. The legislative history is interesting¹¹, but unnecessary to decide whether there has been a constitutional violation, since there is no ambiguity in the plain language of the Green Amendment. See *Makinen v. City of New York*, 30 N.Y.3d 81, 85 (2017). Thus, this Court is fully entitled to compel the State to comply with the Constitution.

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

Conclusion.

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

With no legal mandate or responsibility to do so, the Town of Perinton, nearly 350 miles northwest¹² of New York City, has taken upon itself to be a depository for New York City's garbage. By the granting of a Landfill Permit, the Perinton Town Board has chosen to accept the refuse of non-Perinton communities to the claimed, and apparent, detriment of hundreds of Perinton residents. Certainly, but for the issuance of Permits to WMNY by the

¹¹ "When Assembly member Mankeltow asked whether the Green Amendment would apply to the High Acres Landfill, after stating "the smell's been an issue. The landfill smell is an issue...It never seems to stop," Assemblymember Englebright responded, "yes, but for many of our citizens, they would look at the landfill such as the one you described which is harming people in the community and they would say, We have a right and our government is not living up to its obligation." Foss. Aff. Ex. 9, p.40-41 (Assemb. Mankeltow).

¹² The vast majority of operating landfills in New York State are in Central and Western New York state, hundreds of miles from NYC. High Acres Landfill is one of the largest and most active.

Town of Perinton and the DEC, there would be no Landfill in Perinton and, of course, no violations of FAFE Members' recently acquired constitutional rights to clean air.

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

The Town of Perinton is responsible for future Permits, which if denied, would necessitate the remediation of the then closed Landfill. Problem solved! WMNY would have to find other landfills for its customers', including New York City's, garbage. Since the Permit is issued by a majority vote of an elected town board, which also appoints the members of the land use boards, the decision to issue a permit is political.¹³ Accordingly, it is the right of the voters in Perinton to affect the permit determination through the election of board members.¹⁴ Remarkably, the Perinton Town Board and its land use boards, which through their approval processes are to balance and consider community concerns and permit appropriateness, service and accommodate NYS and NYC to the apparent detriment of many Perinton residents..

¹³Local officials possess a familiarity with local conditions necessary to make sensitive decisions affecting the development of their community; their decisions should not be supplanted by those of the court. See, *Cowan v. Kern*, 41 N.Y.2d 591, 599 (1977).

¹⁴The Perinton Town Board (Council) consists of five members and is the executive body that governs the town. The four town council members serve 4 year terms. The supervisor serves a 2 year term. Two of the four council members are elected in alternating years. Thus every two years at least the supervisor and two council members (constituting a possible majority of the Board) are up for election. The permit is granted by at least a majority, i.e. three votes of the Board. The next Perinton town election is November 7, 2023. In the November 2, 2021 town election, four candidates were competing for two council seats. The second place winning candidate received 90 more votes than the third place losing candidate. Comparatively, there were 9,209 votes in favor of the Green Amendment and 3,988 against, a difference of 5,221. As set forth in footnote 4 above, there was a slightly greater per cent of "yes" votes for the Green Amendment in Perinton than in Monroe County, NYC or NYS. Could an organized "Green" opposition to the permitting affect the election of sympathetic members to a town board?

Petitioner has not included the the *sine qua non* of the claimed Green Amendment violations- the permitting of the Landfill by the Town of Perinton- in this lawsuit.¹⁵ Even more simply: no Permit, then no landfill, then no pollution, then no more violations of the Green Amendment. WMNY would then deposit NYC's garbage elsewhere. NYSDEC's final involvement would be to effect a proper remediation of the closed Landfill. Until such time, if ever, that the Perinton electorate affects the permitting process, FAFE will wage its David v. Goliath¹⁶ legal battles to enforce its Green Amendment rights against the Defendants.

These lawsuits set forth the apparent failings of the existing regulatory processes and seek added redress through the Green Amendment. Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to act to prevent environmental harms is uncertain. Indeed, the vigor of the State's opposition to this lawsuit does not bode well for its enforcement of the Green Amendment.¹⁷

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

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

Motion #2. The State has not carried its burden on its Motion to Dismiss. FAFE has properly stated a cause of action. The State's Motion **is denied.**

¹⁵ See footnote 7.

¹⁶ 1 Samuel 17.

¹⁷ Contrariwise, as set forth at the New York State Bar Association January 2022 Annual Meeting of the *Environment and Energy Law Section*:

The Impact of the Green Amendment - *A New Era of Environmental Jurisprudence* by Prof. Nicholas A. Robinson1Elisabeth Haub School of Law at Pace University:

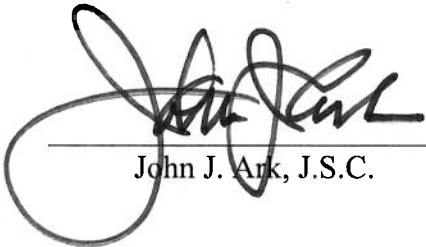
“Protecting Environmental Rights Now Guides All Governmental Environmental Duties. 1. All State Agencies and local governments are obliged to respect Article 1, Section 19, and to interpret their duties in ways that ensure a person's environmental rights will be respected. Interpretation of statutes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

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

Any other requests for relief are Denied

SO ORDERED.

Dated: December 7, 2022
Rochester, New York



John J. Ark, J.S.C.

COURT EXHIBIT 1

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

Doc #

2 COMPLAINT.

20 NOTICE OF MOTION City of New York's Motion to Dismiss

21 AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION

22 EXHIBIT(S) Complaint

23 MEMORANDUM OF LAW

25 NOTICE OF MOTION

26 AFFIDAVIT IN SUPPORT OF MOTION: Affidavit of Thomas P. Haley

27 EXHIBIT(S) Ex 1 - Landfill Permit

28 EXHIBIT(S) Ex 2 - O&M Manual

29 EXHIBIT(S) Ex 3 - Air Permit

30 EXHIBIT(S) Ex 4 - Notice of Violation

31 EXHIBIT(S) Ex 5 - FAFE petition to modify permit

32 EXHIBIT(S) Ex 6 - DEC Response to FAFE petition

33 EXHIBIT(S) Ex 7 - FAFE Letter to DEC (August 10, 2021)

34 EXHIBIT(S) Ex 8 - DEC Response to FAFE Letter (August 25, 2021)

35 AFFIDAVIT IN SUPPORT OF MOTION: Affirmation of Mihir Desai

36 EXHIBIT(S) 2017 A6279 Sponsor Memo

37 EXHIBIT(S) 2018 A6279 Assembly Debate 2018-04-24

38 EXHIBIT(S) 2021 A1368 Assembly Debate 2021-02-08

40 MEMORANDUM OF LAW IN SUPPORT

41 NOTICE OF MOTION

42 AFFIDAVIT OR AFFIRMATION IN SUPPORT OF MOTION: K. Foss Affirmation

43 EXHIBIT(S) FAFE 2018 Petition

44 EXHIBIT(S) NYSDEC Response

- 45 EXHIBIT(S) NYSDEC Response Attachments
- 46 EXHIBIT(S) NYSDEC Letter
- 47 EXHIBIT(S) Assembly Debate 2017-04-24
- 48 EXHIBIT(S) Excerpts Assembly Env Comm 2017 Annual Report
- 49 EXHIBIT(S) Assembly Debate 2018-04-24
- 50 EXHIBIT(S) s2072 I2019
- 51 EXHIBIT(S) Assembly Debate 2019-04-30
- 52 EXHIBIT(S) s2072 I 2019 sponsor memo
- 53 EXHIBIT(S) Excerpt Assembly Env Comm 2019 Annual Report
- 54 EXHIBIT(S) s528 I 2021
- 55 EXHIBIT(S) Assembly Debate 2021-02-08
- 56 EXHIBIT(S) s528 I 2021 Sponsor Memo
- 57 EXHIBIT(S) Excerpt Assembly Env Comm 2021 Annual Report
- 58 EXHIBIT(S) Nov 2021 Vote Results
- 59 EXHIBIT(S) Complaint
- 60 MEMORANDUM OF LAW IN SUPPORT
- 61 NOTICE OF MOTION (AMENDED): Amended Notice of Motion by the State
- 64 LETTER/CORRESPONDENCE - SO ORDERED
- 65 MEMORANDUM OF LAW IN OPPOSITION
- 66 MEMORANDUM OF LAW IN OPPOSITION
- 67 MEMORANDUM OF LAW IN OPPOSITION
- 68 AFFIDAVIT IN OPPOSITION TO MOTION: Aff. in Opp. to Motions 1, 2, and 3
- 69 EXHIBIT(S) Chart
- 70 EXHIBIT(S) Transcript Excerpt
- 71 LETTER / CORRESPONDENCE TO JUDGE.
- 72 AFFIDAVIT OR AFFIRMATION IN REPLY: Reply Affirmation of Ronald G. Hull, Esq.
- 73 MEMORANDUM OF LAW IN REPLY in Further Support of Motion to Dismiss
- 74 MEMORANDUM OF LAW IN REPLY
- 75 MEMORANDUM OF LAW IN REPLY in Support of the State's Motion to Dismiss
- 76 AFFIDAVIT OR AFFIRMATION IN REPLY: Affidavit of Scott E. Sheeley
- 77 LETTER / CORRESPONDENCE TO JUDGE
- 78 LETTER / CORRESPONDENCE TO JUDGE
- 79 LETTER TO JUDGE The State's letter re: Paynter and related cases under the Education Article
- 80 LETTER TO JUDGE: K. Foss Letter to Judge Ark re Education Article Cases.
- 81 LETTER TO JUDGE: FAFE's Letter to Judge Ark re Education Article Cases