

NYSCEF DOC. NO. 2

RECEIVED NYSCEF: 01/28/2022

MONROE COUNTY CLERK'S OFFICE

THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt #

Book Page

No. Pages: 31

Instrument: COMPLAINT

Control #: Unrecorded #8808719

Index #: Unassigned-1500502

Date:

Time:

Return To:
LINDA RADKO SHAW

Fresh Air for the Eastside, Inc.

The State of New York
New York State Department of Environmental Conservation
The City of New York
Waste Management of New York, L.L.C.

Total Fees Paid: \$0.00

Employee:

State of New York

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

JAMIE ROMEO

MONROE COUNTY CLERK



SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

vs.

COMPLAINT

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

Defendants,

Plaintiff, Fresh Air for the Eastside, Inc. (“FAFE”) for its Complaint, by its attorneys,
Knauf Shaw LLP, alleges as follows:

INTRODUCTION

1. In this action, Plaintiff complains, *inter alia*, the constitutional rights of its members (the “Members”) to clean air and a healthy environment, guaranteed by Section 19 of Article I of the New York Constitution (the “Green Amendment”), are being violated as a result of the improper operation of the High Acres Landfill (“the Landfill”), located at 425 Perinton Parkway in the Town of Perinton, Monroe County, and in the Town of Macedon, Wayne County, in the State of New York, owned and operated by Defendant Waste Management of New York, L.L.C. (“WMNY”) in a manner that negatively affects air quality.

2. The operation of 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.

3. The Odors and Landfill Gas emissions arise from the negligent, intentional,

wrongful, and/or illegal nondiscretionary acts and/or omissions of WMNY in failing to adequately install, maintain, monitor and operate the Landfill Gas collection system at the Landfill (“Collection System”), provide adequate cover systems, monitor leaks in the cover system, mitigate known sources of Fugitive Emissions, and the negligent management by WMNY of large volumes of odorous municipal solid waste (“MSW”), especially the NYC Garbage.

4. The majority of the MSW disposed of at the Landfill is generated by defendant City of New York (the “NYC Garbage”) and transported by rail to the Landfill for disposal. Yet despite the continuing Garbage Odors caused by the NYC Garbage and certain remedies available to it in its contracts with WMNY to enforce compliance with applicable law, NYC continues to contribute to the unclean air and unhealthful environment experienced by the Members and Community caused by the NYC Garbage.

5. 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 in Environmental Conservation Law (“ECL”) §27-0106, which makes landfilling the solid waste management strategy least preferred and prioritized, and the New York Climate Leadership Community Protection Act (“CLCPA”) set forth at ECL Article 75, which makes reduction of GHG the goal of the State.

6. Defendants the State and New York State Department of Environmental Conservation (“NYSDEC”) (together “the State”) 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.

PARTIES

7. Plaintiff is a New York not-for-profit corporation with offices located in Monroe

County in the State of New York. Plaintiff was organized exclusively to carry on the activities of a charitable or educational organization as specified in Section 501(c)(3) of the Internal Revenue Code.

8. Plaintiff was formed to, among other things, preserve and protect the environment for the benefit of residents living in the local community (“Community”) by performing activities such as working with elected officials and the public on environmental issues and ensuring compliance with land use, zoning and environmental laws, codes, and regulations.

9. 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.

10. The Members of FAFE include more than 200 individuals who own property and/or reside about 0.3 to 4 miles from the Landfill 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.

11. Defendant the State of New York maintains offices at the New York State Capitol Building, State Street and Washington Avenue, Albany, New York 12224.

12. Defendant NYSDEC is a governmental agency created and existing under the laws of the State of New York, with offices at 625 Broadway, Albany, NY 12233-7020, in the City and County of Albany and State of New York. Defendant is responsible for regulatory oversight and operating permit enforcement of the Landfill.

13. Defendant NYSDEC was created on April 22, 1970 and was delegated the authority to protect and enhance the environment within the State of New York.

14. 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.”

15. 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, including CLCPA.

16. Defendant City of New York (“NYC”) is a municipal corporation created and existing under the laws of the State of New York, with an office at City Hall, New York, New York 10007.

17. Defendant NYC is responsible for the collection, transport, and disposal of MSW generated in NYC, including the NYC Garbage.

18. NYC has contracted with WMNY to collect, transport, and dispose of the NYC Garbage, and the contracts provide that should WMNY fail to comply with any laws, and create any impermissible odors or other adverse environmental affects, then a breach of the contracts have occurred, and NYC can enforce the breach and therefore abate the impermissible odors or other adverse environmental effects.

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

THE LANDFILL HISTORY

20. Upon information and belief, the original Landfill began operating in 1972 under permits issued by the Town of Perinton and the Monroe County Health Department.

21. Upon information and belief, the original 72-acre Landfill, an unlined cyanide contaminated Superfund site, was closed and permanently covered in 1995.

22. The remaining portions of the Landfill in Perinton are not permanently covered and are approximately 155 feet in elevation above surrounding grade and encompass over 296 acres of land.

23. The Landfill is governed by numerous permits issued by Defendant NYSDEC, including 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”).

24. The current Landfill Permit expires on July 8, 2023 and permits WMNY to construct and operate a Mixed Solid Waste Landfill with an approved design capacity of 3,500 tons per day (“TPD”).

25. In 1993, the Landfill was issued its first MSW Landfill Permit by NYSDEC in conjunction with the approval of the Western Expansion of the Landfill (“WEX”), which consists of Cells 1 through 9.

26. An air pollution permit was first issued by NYSDEC in 1991 and subsequently modified to authorize new Landfill cells and large height expansions.

27. The current Air Permit expired on December 1, 2021.

28. In 2001, the Landfill Permit was modified to include the Parkway Expansion Phase I (“Phase I Expansion”), which consists of Cells 6V-OL, 7V-OL and 8V/9V-OL, and again in 2003 to include the Parkway Phase II Expansion (“Phase II Expansion”), which consists of Cells 10 and 11. The WEX, Phase I Expansion, and Phase II Expansion are all located in Perinton.

29. In 2008, NYSDEC approved a modification to the Landfill Permit to include the Parkway Expansion Phase III and a 100-foot additional height expansion in the approved elevation of the existing Landfill in Perinton and the Town of Macedon (the “Vertical Expansion”). The Phase III Expansion area included an additional 110 acres of land for new Cells 12, 13, 13-OL, 14,

15, 16 and 17, which are in the Town of Macedon.

30. In 2011, the Landfill Permit was further modified pursuant to *Preserve Scenic Perinton Alliance, Inc. v. Porter*, 32 Misc.3d 1216(A), 934 N.Y.S.2d 36 (Sup. Ct. Monroe Co. 2010, Hon. John J. Ark, J.S.C.), which required the Landfill to eliminate the 100-foot Vertical Expansion in Perinton approved in 2008 since the NYSDEC unlawfully permitted this Vertical Expansion beyond its ten-year permit authority.

31. In 2013, the Landfill Permit was modified to allow WMNY to construct and operate a rail siding to manage waste brought to the Landfill via intermodal rail from NYC.

32. Since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts for disposal.

33. 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:

	2014	2015	2016	2017	2018	2019	2020
Rail NYC Garbage tons per year ("tpy")	-	284,392	559,214	567,711	724,744	613,837	646,744
Total MSW (tpy)	211,317	475,316	750,084	796,065	838,850	686,848	717,891
NYC Garbage as Percent of Total MSW	0%	60%	75%	71%	86%	89%	90%
% Increase in Landfill Deposit Rate Since 2014 from Rail NYC Garbage	0%	125%	255%	277%	297%	225%	240%

34. Thus, since mid-2015, the Landfill has primarily functioned as a disposal facility

for NYC Garbage.

35. MSW arriving by rail at the Landfill is significantly more odorous, as compared to MSW received by direct truck hauling, because, *inter alia*, of the increased transport time and the inevitable delays in intermodal transportation on the CSX rail line, which is also shared by Amtrak commuter trains, resulting in increased residence time for the MSW to decompose in the rail containers prior to being tipped at the working face of the Landfill.

36. No environmental review has been performed by NYSDEC pursuant to the State Environmental Quality Review Act to address the air impacts experienced by the community since 2016, or the substantial increase of NYC Garbage and resulting Odors.

37. Some operational changes have been made by WMNY purportedly to mitigate ongoing Odors, but they have been ineffective.

THE ODORS AND FUGITIVE EMISSIONS PLAGUE THE COMMUNITY

38. WMNY's inadequate operation of the Landfill results in Odors and Fugitive Emissions invading the Community including public places, private properties, and homes of Community residents, including Members.

39. Based on information provided by WMNY in its Air Permit as well the June 2021 Air Permit renewal application, the Landfill Gas collection system collects and treats approximately 85% of the Landfill Gas when fully operational, which means that at least the remaining 15% of the Landfill Gas is released directly into the Community as untreated Fugitive Emissions.

40. The Fugitive Emissions consist of methane, carbon dioxide, and non-methane organic compounds ("NMOC").

41. According to the U.S. Agency for Toxic Substances and Disease Registry

(“ATSDR”), the NMOCs most found in landfills include volatile organic chemicals (“VOCs”), and hazardous air pollutants (“HAPs”), such as acrylonitrile, benzene, 1,1-dichloroethane, 1,2-cis dichloroethylene, dichloromethane, carbonyl sulfide, ethylbenzene, hexane, methyl ethyl ketone, tetrachloroethylene, toluene, trichloroethylene, vinyl chloride, and xylenes.

42. NYSDEC has increasingly allowed solid waste landfills to becoming the dumping ground for contaminated soil that does not rise to the level of being hazardous waste, but which still includes petroleum and other chlorinated solvent contamination to be used as daily cover for the landfill surface, further releasing VOCs into the surrounding air.

43. NMOCs also include hydrogen sulfide and other odorous reduced sulfur compounds that smell of rotten eggs, even in the parts per billion range.

44. The methane present in the Fugitive Emissions is a potent GHG.

45. When the Landfill Gas collection system is non-operational or defectively operating, it operates at substantially less than the claimed 85% efficiency in the Air Permit, and resultant additional Fugitive Emissions are released into the air and the Community, including additional methane, VOCs, HAPs, hydrogen sulfide and reduced sulfur compounds, beyond that allowed in the Air Permit.

46. The Odors and the release of the Fugitive Emissions, including methane, VOCs, HAPs, hydrogen sulfide and reduced sulfur compounds, has resulted in unclean and unhealthful air in the Community.

47. The Fugitive Emissions and Odors have been pervasive in the Community since 2017 after WMNY made Landfill design and operational changes that permanently impacted the Landfill Gas collection system at the same time it had begun to accept NYC Waste, and thus WMNY became incapable of properly operating the Landfill, for the reasons discussed below.

48. The Odor/Gas events have been well-documented since 2017, when numerous residents complained to the Town of Perinton and NYSDEC and were so frustrated by the lack of response, a software application (“FAFE App”) was developed to document complaints.

49. The FAFE App is a publicly available, free software application that can be downloaded onto one’s phone or computer and provides a platform for real-time odor complaints. The FAFE App geocodes the address and longitude and latitude of the complainant based on their location at the time they detect Garbage Odors and/or Landfill Gas and allows the complainant to provide a description, intensity (scale of 1 to 10), comments, and automatically documents data like the wind direction, wind speed, weather conditions, and barometric pressure.

50. FAFE Members have described the Odors and Landfill Gas as sickening, obnoxious, putrid, foul, and nauseating.

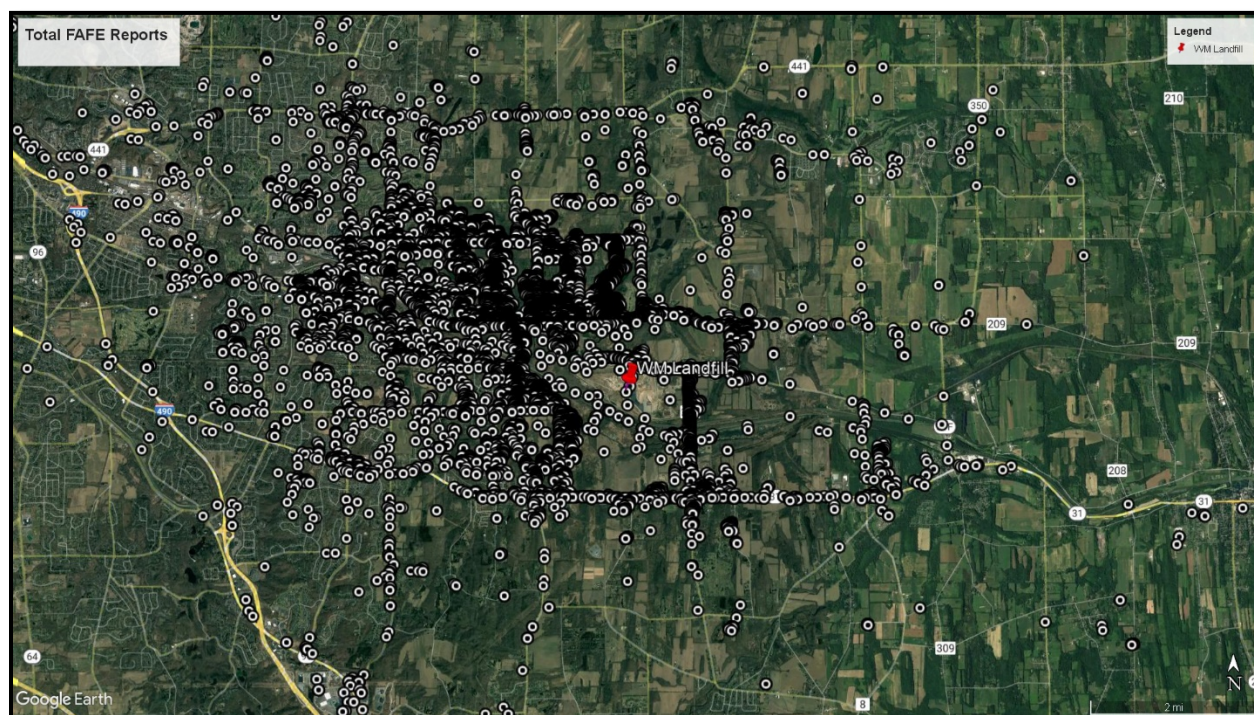
51. WMNY has admitted and acknowledged the Landfill causes Odors to impact the Community.

52. Below is a breakdown of the 23,670 reported FAFE App complaints noted from November 2017 to January 4, 2022:

Year/Quarter	Reports
2017	946
Qtr4	946
2018	10725
Qtr1	6838
Qtr2	1526
Qtr3	1428
Qtr4	933
2019	2942
Qtr1	514
Qtr2	442
Qtr3	946
Qtr4	1040
2020	4604
Qtr1	1017
Qtr2	568

Qtr3	1446
Qtr4	1573
2021	4354
Qtr1	1086
Qtr2	762
Qtr3	1092
Qtr4	1414
2022	99
Qtr1	99
Grand Total	23670

53. Geocoding the longitude and latitude coordinates of FAFE App reports from December 2017 to January 4, 2022, into Google Earth illustrates the wide-spread impacts caused by the Landfill. Each point is an individual complaint report location:

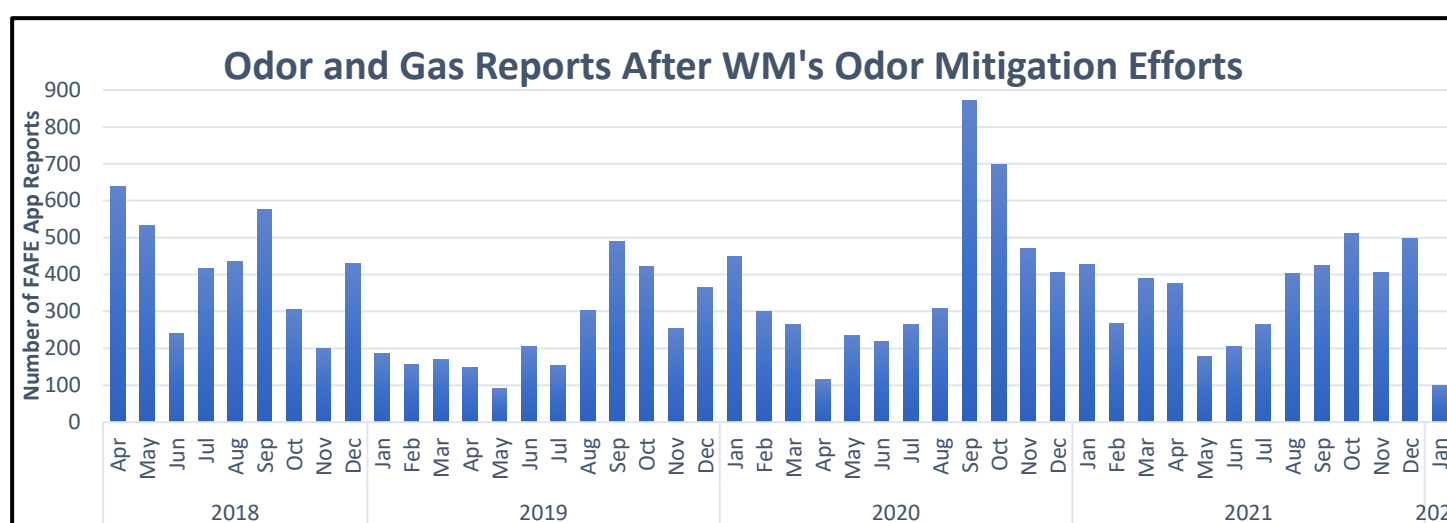


54. NYSDEC and/or WMNY also operate a Hotline (“Hotline”) for Community members to call in air complaints.

55. Upon information and belief, there have still been at least 2,626 air complaints phoned into the Hotline or to WMNY from 2017-2020.

56. Thus, between the FAFE App, the Hotline, and direct contact with WMNY, an estimated total of 26,000 Odor complaints have been reported since late 2017.

57. While WMNY declared in May 2018 after implementing an Odor mitigation plan that the Landfill Gas and Odor releases were under control, the Community continues to be forced to endure excessive and noxious Odors and Landfill Gasses, as documented by the voluminous complaints that continue to be reported despite WMNY's assurances the bad air problems have been solved, as indicated by the chart below.



THE NOTICE OF VIOLATION

58. 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].”

59. The Fugitive Emissions and Odors were so noxious beginning in 2017 that NYSDEC issued a Notice of Violation (NOV) on the Landfill on February 2, 2018, which required the *post hoc* installation of the horizontal Landfill Gas collectors near the surface of Cells 10 and 11, as well as make other operational changes.

60. WMNY admitted at a public hearing held at the Town Hall in January 2018 that

they had caused a public nuisance because they negligently removed the horizontal gas collectors, which were considered to be the Landfill's primary Odor and Landfill Gas control measures in Cells 10 and 11.

61. After response to the NOV, these operational changes were still insufficient to manage the excessive Odors and Fugitive Emissions being created, and NYSDEC ordered Cells 10 and 11 to be temporarily closed and covered with a plastic geomembrane.

62. Nevertheless, even with the temporary plastic geomembrane covering these two defective Cells, the Odors and Fugitive Emissions continue from the remainder of the Landfill, most of which is not permanently covered and causes unclean air and an unhealthful environment for Members and the Community.

THE LANDFILL LACKS ADEQUATE COVER

63. The Landfill lacks adequate cover on Cells 1-9, which have not been landfilled in years, and on the side slopes of this over 155-foot tall mountain of garbage, which contribute to the Odors and Fugitive Emissions.

64. FAFE has advocated to NYSDEC for changes and modifications to the Landfill to decrease the Odors and Fugitive Emissions to no avail. For example, FAFE hired a landfill expert to meet with the NYSDEC and submitted recommendations to improve Landfill performance, which included: covering the expansive, steep side slopes with a permanent geosynthetic membrane cover to better contain the Landfill Gas; monitoring the Landfill surface for leaks more frequently than four times a year currently required; and more comprehensively monitoring of all the Landfill surfaces instead of just the top for leaks of Landfill Gas.

65. The 6 N.Y.C.R.R. Part 360 regulations require that portions of the Landfill that achieve final grade must have a final cover system installed. Because the 155-foot high side slopes

have reached final grade, these final cover regulations apply.

66. Despite the benefits that would be obtained from this obvious improvement recommended by FAFE's landfill expert and required by the regulations, NYSDEC has failed to enforce their final cover regulations in relation to the side slopes, taking the position that despite the fact that the top of Landfill Cells 1-9 have not been landfilled with MSW in years, additional waste may be filled on top in the future.

67. By failing to require placement of a permanent geosynthetic membrane cover on the 155-foot high side slopes, greater amounts of Fugitive Emissions are released, negatively impacting the clean air that FAFE Members and the Community have the right to breathe.

68. By not applying their final cover regulatory requirements to side slopes, NYSDEC has created a loophole in violation of their own regulations that allow Mega-Landfills such as this Landfill to get taller and taller without the mandated final cover on the side slopes, although the cover would increase the efficiency of the Landfill Gas Collection System, mitigate Odors and Fugitive Emissions, and reduce GHG emissions.

SURFACE METHANE MONITORING REVEALS REPEATED EXCEEDANCES

69. New York and, Federal regulations, and the Air Permit require WMNY to conduct at least quarterly monitoring on the surface of the Landfill for Landfill Gas emissions (the "Surface Emission Monitoring" or "SEM") to confirm the adequacy of the Landfill gas collection system to control Fugitive Emissions.

70. The SEM requirements in the air regulations and the Air Permit require WMNY to take corrective action to fix Fugitive Emission leaks if the surface methane concentration in any monitored screening location exceeds 500 parts per million ("ppm").

71. In the NYSDEC NOV issued on February 2, 2018, this action level was lowered to

200 ppm.

72. However, exceptions and limitations in the quarterly SEM program at the Landfill has proved to be woefully inadequate to prevent Fugitive Emissions from negatively impacting Members and the Community.

73. The SEM only measures the concentration of methane and does not directly measure other constituents found in the Fugitive Emissions like VOCs and HAPs.

74. The scanning is not conducted on the side slopes of the Landfill because WMNY claims the slopes are too steep and dangerous to monitor, and NYSDEC has not required, and WMNY has not utilized, other available technology that would obviate this scanning deficiency like the use of drones.

75. The SEM is not conducted during certain weather conditions like snow and rain, which occur frequently, so the timeframe between the 4th quarter SEM screening and 1st quarter SEM screening is typically five months—between November and March—providing for an extended period when no screening is performed, and no repairs are made to the temporary cover of the Landfill.

76. Methane is a primary constituent of Landfill Gas, so high methane concentrations imply elevated leakages of Landfill Gas and Fugitive Emissions, including HAPs and VOCs, meaning when high methane concentrations are documented, it is an indicator the Landfill is causing unclean air and an unhealthful environment.

77. Historically, there had been few methane exceedances reported in the SEM reports for the Landfill until 2018. For example, in 2014, WMNY only reported 7 methane exceedances above 500 ppm, and zero were reported from 2015-2017. However, beginning in 2018, that changed.

78. From March 22, 2018, to March 10, 2021, WMNY documented methane concentrations, an indicator of the presence of VOCs and HAPs, on the surface of the Landfill exceeding the 200 ppm action level on at least 188 occasions, and documented methane concentrations exceeding the 500 ppm action level on at least 161 occasions.

79. From March 22, 2018, to March 10, 2021, the SEM scans detected at least 28 methane measurements at or above 10,000 ppm. The actual measurement values could have greatly exceeded 10,000 ppm since, upon information and belief, that was the sensitivity range at the time of testing. At increased ranges of methane testing, WMNY has even documented values of 14,000 and 24,000 ppm.

80. Not all repairs made to address these high methane emissions were effective, and subsequent Landfill surface monitoring ten days later revealed some exceedances either rebounded or remained above the 200 ppm action level.

81. These failed repairs continue to release Odors and Fugitive Emissions directly into the Community and negatively impact Members' right to breathe clean air.

82. Since the SEM occurs only quarterly at best and no measurements are taken in areas of the Landfill under construction, on the side slopes, or in areas deemed unsafe areas to traverse, there are substantial areas of the Landfill where Fugitive Emission leaks are not monitored and not repaired at all.

83. FAFE's expert recommended increased monitoring frequency to NYSDEC at a meeting held on April 26, 2021, of the entire surface of the Landfill, including the side slopes, from only four times a year, to a continuous monitoring frequency because the current requirement to monitor quarterly are too infrequent to timely identify and repair operational deficiencies that result in Odors and Fugitive Emissions, and thus, unclean air and an unhealth environment.

84. NYSDEC did not require a change to the SEM program as a result of the FAFE expert's recommendation.

85. As a result of the inadequate SEM program, Members and the Community are being unnecessarily forced to breathe unclean, noxious air containing a cocktail of NMOCs, including VOCs, HAPs, hydrogen sulfide and reduced sulfur compounds.

THE LANDFILL CONTRIBUTES TO GLOBAL CLIMATE CHANGE

86. Greenhouse gases ("GHGs") are a variety of gaseous compounds that function to trap heat from the sun within the atmosphere.

87. Anthropogenic climate change is a function of human derived emissions of GHGs.

88. The current and future impacts of climate change will include more severe weather patterns, increased wildfires, increased sea level rise, acidification of the ocean, and changing atmospheric air circulation and rainfall patterns.

89. The most obvious and well-documented contribution to GHG emissions from the management of waste is from the uncaptured emissions of methane (i.e., the Fugitive Emissions) from landfills. As organic materials break down in a landfill's anaerobic environment, methane is generated.

90. Today, methane accounts for about twenty percent of global GHG emissions and is more than 25 times more potent than carbon dioxide at trapping heat in the atmosphere.

91. In 2021, the atmospheric methane concentration increased to a record 1,876 parts per billion, with the methane concentration growth rate in 2020 and 2021 more than double the average annual growth rate seen over the previous 17 years.

92. Defendants are aware that GHGs in the atmosphere must be stabilized to maintain a livable climate and a rapid decrease in emissions is necessary to achieve this goal.

93. MSW landfills in New York generate methane GHG emissions that escape through landfill surface cover materials as well as uncovered areas, and that leak during the active placement of waste.

94. From 2012-2018, the Landfill has emitted an estimated 114,649,786.45 pounds of Fugitive Emissions of methane. The EPA Greenhouse Gas Equivalencies Calculator (“EPA GHGEC”) estimates the methane emitted from the Landfill is equivalent to the GHG emissions from 3,267,425,411 miles driven by an average passenger vehicle, or 146,293,092 gallons of gasoline consumed, or 1,436,986,484 pounds of coal burned.

95. According to the WMNY June 2021 Title V Air Permit Renewal Application (“Renewal Application”), in 2052, the estimated total Fugitive Emissions of GHG from the Landfill will be 209,968 tons per year (“TPY”) of CO₂ equivalents. The 209,968 TPY of CO₂ using the EPA GHGEC equivalent will be approximately 478,713,320 miles driven by an average passenger vehicle, or 21,433,527 gallons of gasoline consumed, or 210,534,131 pounds of coal burned.

96. As noted above, WMNY has documented and NYSDEC is aware of the large number of methane exceedances on the surface portions of the Landfill being monitored. But again, there are large areas of the Landfill not being monitored for methane, so many methane leaks are not being identified and repaired.

97. As a result, the 85% efficiency estimate for the Landfill Gas collection system is overstated since this does not account for portions of the landfill where these gases are not even being monitored and where the surface is not permanently covered.

98. Thus, numerous undocumented GHGs are being emitted to the atmosphere and contribute to the Member’s and Community’s unclean air and unhealthful environment.

**THE LANDFILL IS COUNTER TO NEW YORK
CLIMATE CHANGE LAW AND POLICY**

99. The current operation of the Landfill runs counter to the GHG emission reduction goals in the CLCPA (ECL Article 75) and the New York State Climate Action Council Draft Scoping Plan (“Climate Action Plan”), by allowing excessive emissions of GHGs when there are practical ways to curb such emissions.

100. NYSDEC is mandated to comply with and implement CLCPA when issuing permits to facilities such as WMNY that emit large amount of GHGs by requiring such facilities to make large reductions in GHGs before the permits can be issued.

101. The goal of the CLCPA is an 85% reduction in GHGs by 2050, with an interim target of 40% by 2030, in line with the United States Global Change Research Program (“USGCRP”) and the Intergovernmental Panel on Climate Change (“IPCC”) projections of what is necessary to avoid the most severe impacts of climate change. To date, NYSDEC has done nothing to require the remaining 27 Mega-Landfills in New York, including this Landfill, to be in a position to achieve the CLCPA goals.

102. NYSDEC has an affirmative duty under CLCPA to seek reduction of GHGs and has already started to review and deny permit renewals from natural gas power plants due to a failure to propose GHG emission reductions pursuant to CLCPA requirements.

103. The Climate Action Plan (available at <https://climate.ny.gov/Our-Climate-Act/Draft-Scoping-Plan>), released December 30, 2021, details policy and guidance on how New York will handle GHG emissions for climate change.

104. The Climate Action Plan reports that GHG emissions from waste represent ~12% of statewide emissions, and landfills constitute ~78% of those emissions.

105. The Climate Action Plan states that most waste emissions represent the long-term

decay of organic materials buried in a landfill, which will continue to emit methane at a significant rate for more than 30 years after they are landfilled.

106. The Climate Action Plan details that to achieve the required 2030 GHG emissions reductions, significant diversions from landfills, emission monitoring, and leak reductions are necessary.

107. The CLCPA requires a more dramatic decrease in GHG emissions by 2050, achieving at least an 85% reduction (compared to 1990 levels). This necessitates a dramatic shift in the way waste is managed, to the point that landfills are only used sparingly for specific waste streams, and reduction and recycling are robust and ubiquitous. Also, methods to monitor leaks and emissions are well developed and when implemented, emissions are significantly reduced.

108. In January of 2022, the NYSDEC 2021 Statewide GHG Emissions Report (“2021 GHG Report”) was released. The 2021 GHG Report (available at <https://www.dec.ny.gov/energy/99223.html#Report>) is a foundational component of the State’s strategy for addressing climate change.

109. According to the 2021 GHG Report, methane accounts for 35% of carbon dioxide equivalent emissions in New York State.

110. The Landfill’s Fugitive Emissions are a substantial portion of the statewide GHGs into the atmosphere from waste.

111. Fugitive Emissions make up the vast majority of methane emissions at the Landfill.

112. The 2021 GHG Report states, “Fugitive emissions often contain poorly understood release pathways which can make it difficult to estimate such emissions.” It elaborates that New York State is researching how to reconcile bottom-up and top-down estimates which may result in a higher emission factor for methane and a higher total methane emission estimate.

113. Given that GHGs will continue to be emitted from this Landfill for more than 30 years, and it is already the year 2022, NYSDEC is already allowing WMNY to violate the goals of CLCPA by allowing it to continue to operate under its expired Air Permit, not imposing new additional organic material recycling requirements on the Landfill, and not imposing cover system and monitoring controls that can immediately reduce Fugitive Emissions.

114. The State recognizes the adverse impact climate change has to the economic well-being, public health, natural resources, and the environment of the State.

115. Climate change also results in unusual weather events and WMNY has often blamed the weather (too much rain or snow) as a reason the wells in the Landfill Gas collection system “water out” and fail to function.

116. The State is doing little to nothing to curb emissions from the few remaining New York landfills, including the Landfill, and has failed to fully implement a strategic recycling program, but rather encourages continued landfill disposal in violation of the CLCPA as well as the Solid Waste Hierarchy discussed below.

THE LANDFILL IS COUNTER TO NEW YORK SOLID WASTE LAW AND POLICY

117. In New York, more than 18 million tons of MSW is generated each year, or 1,850 pounds for every person that lives in the State.

118. ECL §27-0106 provides for the following priorities for solid waste management, which is referred to as the “Solid Waste Hierarchy”:

In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this section, establishes as its policy that:

1. The following are the solid waste management priorities in this state:

(a) first, to reduce the amount of solid waste generated;

(b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;

(c) third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and

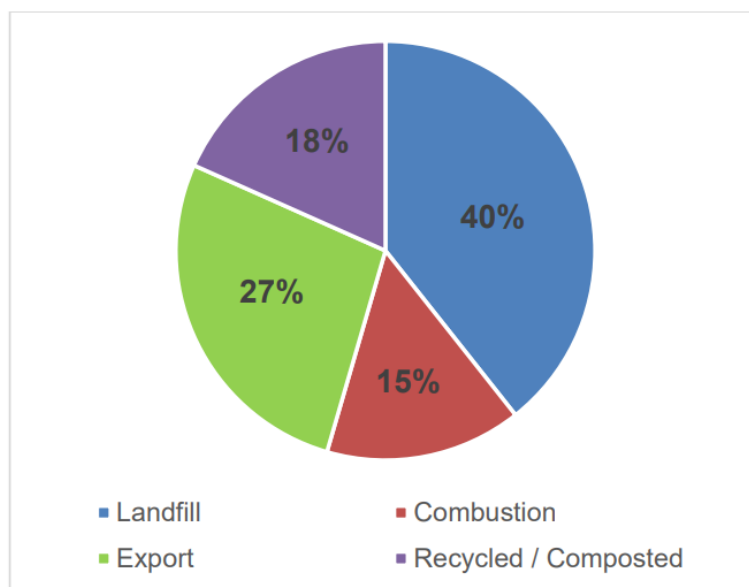
(d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department...

119. Despite the Solid Waste Hierarchy, the State has failed to implement its own 2010 Solid Waste Management Plan, which is supposed to incentivize recycling and waste reuse over landfilling - the least favorable form of solid waste management. Instead, most solid waste is disposed of at 27 Mega-Landfills, mostly located in Central and Western New York.

120. The Solid Waste Hierarchy provides that landfilling is the last resort for solid waste management, and energy recovery prior to landfilling is preferred.

121. In 2018, approximately 7,174,868 tons of MSW ended up in landfills in New York, plus an additional 4,954,487 tons of MSW were exported, chiefly to out-of-state landfills.

Figure 26. End Use of MSW Generated in New York (2018)



Source: DEC Solid Waste Annual Report.

122. The State has done little to encourage the development of recycling and waste to energy facilities between 1998 and 2021 even though there are ten waste-to-energy facilities that are operational in New York State, which emit little to no methane and control other emissions, and thus create much less CO₂ equivalents and much less environmental impact than landfills.

123. Upon information and belief, NYSDEC advises applicants for waste-to-energy facilities that it may take as long as 10 years to obtain the permits required for a new waste to energy facility, which has discouraged development in violation of the Solid Waste Hierarchy and CLCPA goals.

124. To the contrary, the State has encouraged landfilling by readily approving landfill height and footprint expansions.

125. This landfill expansion policy has enabled the 27 remaining New York landfills to become “Mega-Landfills” without any consideration of the impacts and burdens these overly large landfills are having on the communities in which they exist, and perpetuating landfilling over statutorily and environmentally preferable MSW technologies.

126. Instead, the State continues to allow large footprint and height expansions at the few remaining landfills without mandating significant improvements to mitigate the impacts these landfills are causing on their local communities.

127. For example, anaerobic digesters could be used at the Landfill to avoid disposal and recycle organic materials such as food waste, but this is not being implemented at the Landfill.

128. The continued permitting of MSW to be dumped at the defectively designed and operated Landfill, which remains largely uncovered and infrequently monitored, is contrary to ECL §27-0106, and the interests of public health, safety, welfare, conservation of energy and

natural resources, and contributes to the unclean air and unhealthful environment of the Members and the Community.

FAILURE OF NEW YORK CITY TO TAKE PROPER ACTION

129. NYC continues to ship large volumes of NYC Garbage to the Landfill.

130. Upon information and belief, NYC continues to arrange for the transportation and disposal of its NYC Garbage via the Landfill, despite the fact that WMNY has caused impermissible odors and other adverse environmental affects in violation of their contracts.

131. NYC is not enforcing its contracts with WMNY, despite the repeated and continuous breaches of the contractual requirements for WMNY to comply with legal requirements and not create any impermissible odors or other adverse environmental affects, and is therefore failing to abate the impermissible odors or other adverse environmental effects caused by WMNY.

132. NYC is engaging in an unsustainable practice in relation to the long term handling of the NYC Garbage since it does not manage it in a manner consistent with the Solid Waste Hierarchy, but rather it merely ships its Garbage out of NYC to whichever landfill will take it and has not had a plan to recycle and reuse large amounts of its waste for years.

133. Because NYC does not effectively recycle NYC Garbage or use it to generate energy, NYSDEC has allowed NYC to send its MSW to landfills in Central and Western New York, including the Landfill, and thereby causing unclean air and an unhealthful environment for those who live near those landfills.

134. Not only does this policy violate the Solid Waste Hierarchy, but it also violates principles of Environmental Justice by imposing undue environmental impacts of NYC Garbage on Central and Western New Yorkers, who have on average, lower incomes, and less political

influence than residents of NYC.

IMPACTS ON MEMBERS

135. FAFE Members are exposed to Fugitive Emissions and Odors when they are outside in public spaces, in addition to inside their private residences, such as while at the High Acres Fairport Little League fields, the Macedon Walmart and Lowes stores on Route 31 in Macedon, Dudley and Northside Elementary Schools, Thomas Creek Ice Rink, soccer fields at Center Park West, dining in restaurants in the Village of Fairport, walking on the Erie Canal trail, and so-called wildlife trails WMNY create around the perimeter of the Landfill to look and act “green”.

136. The Members have experienced a decreased quality of life due to the Odors and Landfill Gas from the Landfill by refraining from using their backyards; refraining from entertaining in their backyards; refraining from going outside; refraining from exercising outdoors including use of the local trails; preventing children from playing outside; and needing to keep windows closed to prevent the Landfill Gas and Odors from entering their homes.

137. Examples of Members impacted by the Odors and Fugitive Emissions include Michael and Heather Merlo, residing at 7 Tea Olive Lane Fairport NY 14450, Justin and Kaitlyn Foley, residing at 24 Tea Olive Lane, Fairport, NY 14502, and Gary and Jennifer McNeil, residing at 11 Golden Bell Court, Fairport, NY 14450.

138. Heather and Michael Merlo reside about 0.6 miles north of the Landfill, and regularly experience Odors and Landfill Gas caused by the Landfill that permeates the inside of their house and also outside on their property.

139. Due to the Odors and Landfill Gas, the Merlos frequently cannot use their yard due to the noxious nature of the air they are forced to breathe, must refrain from exercising outdoors,

cannot invite friends over, routinely check weather reports and wind direction and speed before planning outdoor activities for themselves or their children. The Odors and Landfill Gas has become a regular occurrence inside their home and negatively impacts all aspects of day-to-day life.

140. The Merlos recognize the Fugitive Emissions primarily consist of methane and stress over the fact the climate and life they have enjoyed will continue to be negatively impacted for their children and future generations by the GHGs from Mega-Landfills like the Landfill.

141. Members acknowledge the Landfill Gas and Fugitive Emissions with GHGs impact the climate, and the lack of action by the Defendants is irrevocably altering their lives and their children's future. They believe the increase in global temperature will negatively change the local environment due to increased temperatures and precipitation. This will inhibit the ability of Members and their children to continue to enjoy winter activities such as skiing at Bristol Mountain, or summertime activities such as biking, running, and playing soccer or baseball on local trails and ball fields. Further, they are worried about climate change changing the local ecosystem, resulting in impacts such as increasing the spread of dangerous ticks and Lyme disease into nearby hiking and recreational trails they use.

142. The Merlos acknowledge GHGs impact climate change and are concerned the lack of action to reduce methane emissions from the facilities like the Landfill by the Defendants is irrevocably altering their children's future.

143. Gary and Jennifer McNeil reside about 0.8 miles north of the Landfill, and regularly experience Odors and Landfill Gas caused by the Landfill entering their house and emanating onto their property.

144. Due to the Odors, the McNeils have refrained from making property improvements,

seriously considered selling their home on a number of occasions, and keep their children inside their home when the Odors and/or Landfill Gas are present.

145. The McNeils are concerned about the GHGs emitted from the Landfill, and the fact the climate and life they have enjoyed will not be present for their two children and future generations. The McNeils acknowledge GHGs impact climate change and are alarmed that the lack of action by the Defendants is irrevocably altering their children's future.

146. Justin and Kaitlyn Foley reside approximately 0.8 miles north of the Landfill. The Foleys have refrained from holding any large events at their home in fear that their guests would experience these noxious air impacts. They often refrain from using their backyard when Odors and Landfill Gasses are present and keep their windows closed in fear that the Odors and air containing VOCs and HAPs will enter their home. The Foleys' daily activities are often interrupted by their inability to breathe clean air.

147. The Foleys are concerned the climate and life they have enjoyed may not be present for their three children and future generations. The Foleys acknowledge GHGs impact climate change and the lack of action by the Defendants' is irrevocably altering their children's future.

148. Members are concerned with the impacts climate change, being caused by large GHG emitters like the Landfill, will have on 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.

**AS AND FOR A CAUSE OF ACTION FOR VIOLATION OF ARTICLE I §19 OF THE
NEW YORK CONSTITUTION PLAINTIFF ALLEGES AS FOLLOWS:**

149. Plaintiff repeats and realleges the allegations of paragraphs "1" through "148" of this Complaint, as set forth in this paragraph at length.

150. Section 19 of Article I of the New York Constitution provides for "Environmental

rights,” and guarantees “Each person shall have a right to clean air and water, and a healthful environment.”

151. Article I §19 recognizes and functions to preserve New Yorker’s constitutional right to clean air, clean water, and a healthful environment. These inherent and inalienable rights reflect the basic societal contract between citizens and the government of New York.

152. The 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.”

153. The combined acts and omissions of the Defendants in the management of MSW, including the failure of the State to properly exercise its enforcement powers, are causing dangerous, excess concentrations of GHGs to be emitted into the atmosphere, further contributing to the cumulative impact of anthropogenically sourced climate change.

154. 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.

155. The State, and in particular NYSDEC, has an affirmative duty to all the citizens of New York to protect the environment.

156. 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.

157. 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.

158. Furthermore, the continued operation of the Landfill is in violation of the Solid Waste Hierarchy, which makes landfilling the least favored option, in the “interest of public health, safety and welfare and in order to conserve energy and natural resources.”

159. 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 City Charter to ensure the proper disposal of NYC Garbage which it can enforce through the NYC contract with WMNY to prevent Community impacts.

160. 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.

161. 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.

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

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

164. WMNY has acted jointly and/or in concert with the State and NYC, and with the approval of NYSDEC, to operate the Landfill in a manner that results in the Odors and Fugitive Emissions which deprive Members of their right under the Green Amendment to clean air and a healthful environment.

165. 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 GHGs.

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

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

168. 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.

WHEREFORE, Plaintiff respectfully 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.

Dated: Rochester, New York
January 28, 2022

/s/ Linda R. Shaw
KNAUF SHAW LLP

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