STATE OF NEW YORK
ALBANY COUNTY SUPREME COURT

Oral Argument Requested

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

Plaintiffs,

-against-

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

Defendants.

Index No. 902866-24

DEC MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

New York's recently enacted Green Amendment constitutionally protects an individual's right to "clean air and water, and to a healthful environment" (NY Const art I, § 19). It is an important addition to the Bill of Rights that protects individual rights against government intrusion. Plaintiffs' lawsuit, by contrast, alleges that a private landfill, owned and operated by Seneca Meadows, Inc., is unconstitutionally emitting odors. Plaintiffs allege that the Department of Environmental Conservation (DEC), which regulates landfills and other solid waste management facilities, must civilly prosecute Seneca Meadows for the alleged odors.

Plaintiffs do not state a cause of action. Neither the Green Amendment nor any other law provides them the right to compel DEC enforcement against a third party. DEC has discretionary enforcement authority over landfills, and courts have long recognized that constitutional separation of powers forbids judicial interference with the exercise of that discretion. Nothing in the text or history of the Green Amendment—or in the judicial interpretations of similar green amendments in other states—supports the conclusion that the Green Amendment alters the separation of powers or otherwise requires the State to take affirmative action against third parties. Plaintiffs' claim seeking to compel DEC enforcement action

against the landfill should be dismissed because the Green Amendment does not mandate DEC enforcement action against third parties.

Plaintiffs' related request for an injunction to stop DEC's ongoing review of permit applications by Seneca Meadows to expand the landfill in order to extend its useful life is likewise subject to dismissal. The challenge, whether made on constitutional or some other legal grounds, is not ripe for judicial review because DEC has made no final decision on the pending applications.

Lastly, the corporation plaintiffs in this action lack standing to assert Green Amendment claims. The Green Amendment secures individual rights regarding human and environmental health, attributes that corporations do not possess.

LEGAL BACKGROUND

1. DEC's Authority Over Solid Waste Management Facilities

For the last half century, DEC has exercised regulatory responsibility over solid waste management in the state (*see* L.1973, ch. 399, § 2). DEC facilitates "short and long term planning for solid waste disposal" throughout the state, (ECL § 27-0703[1]), and also issues permits to individual solid waste management facilities, such as landfills (ECL 27-0707).

As a part of its regulatory powers, DEC has discretionary enforcement authority over the facilities. DEC "may revoke" a facility's permit or "may enjoin" violations of the solid waste management law (ECL 71-2703[1]). It also "may" require a permittee to implement remedial measures and corrective actions for legal violations (ECL 71-2727). One operating requirement placed on solid waste facilities is that they "must ensure that odors are effectively controlled so that they do not constitute a nuisance as determined by [DEC]" (6 NYCRR 360.19[i]).

Many landfills need a second DEC permit. A landfill that constitutes a "major source" of air emission under the federal Clean Air Act must also obtain a DEC permit pursuant to Title V of the Act (42 USC Chapter 85, Subchapter V). DEC implements and enforces the Title V permit program in New York through authority granted by the federal Environmental Protection Agency (EPA) (s*ee* 66 Fed Reg 63,180 [December 5, 2001]; *see also* 40 CFR part 70; ECL 19-0311[1]; 6 NYCRR subpart 201-6). EPA has the authority to review and object to a Title V permit before DEC issues it (*see* 6 NYCRR § 201-6.3[c]). Title V permits contain requirements for monitoring, record-keeping, and reporting of air emissions to DEC (*see* 6 NYCRR § 201-6.4). A permit-holder must annually certify compliance to DEC and must renew the permit every five years (*see* 6 NYCRR § 201-6.4[e], [h]).

DEC also has discretionary enforcement authority for its Title V permits. When a landfill violates its Title V air permit, DEC "may" enjoin violations, (ECL 71-2103[1]), and "may" modify, suspend or revoke the permit (6 NYCRR § 621.13[a]).

2. DEC's Permit Modification Application Review Responsibilities

When DEC considers a permit modification application for a solid waste management facility, it must comply with the State Environmental Quality Review Act (SEQRA) (*see* ECL Article 8). Where, as here, DEC is the lead agency, SEQRA requires that DEC take a hard look at areas of environmental concern regarding a proposed action (*see generally* 6 NYCRR 617.7). If the proposed action may include the potential for at least one significant adverse environmental impact, DEC requires the project sponsor to produce an environmental impact statement (*see* ECL 8-0109[2]; 6 NYCRR §§ 617.2[ac], 617.7[a][1], and 617.9). A scoping document focuses the environmental impact statement on potential significant adverse impacts of the proposed project (*see* 6 NYCRR § 617.8). After the environmental impact statement is finished—at the conclusion of a process that includes public participation—DEC generally completes its SEQRA obligations by issuing a

written findings statement before it makes a final decision on the proposed action (*see* 6 NYCRR § 617.11[a]).

3. The Green Amendment

In 2021, New York voters adopted a new amendment to the New York State Constitution, section 19 of Article I. Commonly called the "Green Amendment," the provision grants that "[e]ach person shall have a right to clean air and water, and to a healthful environment" (*id.*). The amendment took effect January 1, 2022.

The text of New York's Green Amendment differs from green amendments adopted in Pennsylvania and Montana, each of which places affirmative obligations on the state. Pennsylvania's green amendment labels the Commonwealth a "trustee" of environmental resources and charges it with the responsibility to "conserve and maintain them for the benefit of all the people" (Pa Const art I, § 27). Montana's green amendment requires the State to "maintain and improve a clean and healthful environment," and obliges its legislature to "provide for the administration and enforcement of this duty" (Mont Const art IX, § 1).

FACTUAL BACKGROUND

The Seneca Meadows landfill, owned and operated by Seneca Meadows, Inc., is located in the town of Seneca Falls, New York. (NYSCEF Doc. No. 2,

compl. ¶ 1). The landfill operates under two DEC permits: a solid waste management permit and a Title V air emissions permit. (*Id.* ¶ 24; Haley aff exhs A, B).

DEC placed specific conditions in Seneca Meadows' waste management permit regarding odor control. (*Id.* ¶¶ 55-56; Haley aff exh A at 24-27). These conditions include requirements to complete an off-site odor assessment program, to supply DEC with monthly logs of odor complaints, to monitor landfill surface emissions, to install horizontal gas collection lines, to maintain a 12-inch cover on landfill surfaces that are not current areas of waste disposal, and to maintain a 6-inch cover on exposed surfaces of solid waste at the end of daily operations in active areas. (*Id.*).

Under its current waste management permit, Seneca Meadows expects to run out of room for solid waste at the end of 2025. (*See* compl. ¶ 3). In 2020, Seneca Meadows applied to extend the useful life of the landfill by expanding its size. (*See id.* ¶ 28; Haley aff exhs C, D).

To date, DEC has issued a positive declaration pursuant to SEQRA and a final scoping document that will guide an environmental impact statement that Seneca Meadows now must produce. (*Id.* ¶¶ 31-36). DEC has not made any final determinations on the applications to modify the permits but has

instead concluded that Seneca Meadows' application materials are incomplete. (*See id*.; Haley aff ¶ 10, exhs E, F).

In March 2024, plaintiffs, a collective of individuals, organizations and corporations, commenced this action. As well as alleging causes of action for private and public nuisance against Seneca Meadows, plaintiffs seek a declaration that DEC's alleged failure to take enforcement action against Seneca Meadows for landfill odors violates the Green Amendment. (*Id*. compl. ¶¶ 70-107). They also seek a judicial denial of Seneca Meadows' requested permits through a Green Amendment-based injunction forcing DEC to stop reviewing the pending permit applications. (*Id*. ¶¶ 105-107).

DEC now moves to dismiss the complaint as against it.

ARGUMENT

POINT I

PLAINTIFFS LACK A COGNIZABLE GREEN AMENDMENT CLAIM

The relief plaintiffs seek, judicial compulsion of enforcement action by DEC, is unavailable.[1] Separation of powers requires that the Judiciary

[1] No appellate court has yet interpreted the Green Amendment. An appeal is currently pending before the Appellate Division, Fourth Department based on a similar lawsuit where the plaintiffs assert a Green Amendment right to

respect the Legislature's choice to vest enforcement authority in the Executive branch. Nothing in the text or the history of the Green Amendment suggests that it is intended to override the Legislature's choice to give enforcement discretion over regulated landfills to DEC. Plaintiffs' separate attempt to stop DEC's ongoing application review must be dismissed as unripe for judicial review. DEC has not approved any part of Seneca Meadows' proposal, and the Court cannot adjudicate the validity of a permitting determination that DEC has yet to make.

A. Plaintiffs Cannot Compel DEC Enforcement Against Seneca Meadows.

Plaintiffs claim a constitutional right to compel DEC into taking enforcement steps against Seneca Meadows based on the discretionary enforcement authority provided to DEC by the ECL. The Green Amendment does not alter DEC's enforcement discretion, however, and so plaintiffs cannot compel DEC to enforce against Seneca Meadows.

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compel DEC enforcement action against a privately owned and operated landfill (*see* NYSCEF Docket No. CA 23-00179). Briefing and oral argument are completed, and the Court will likely issue a decision before the return date of this motion or shortly thereafter. Video of oral argument is available at https://ad4.nycourts.gov/njs/term/argument/calendar?date=2024-05-20T00:00:00.000Z&venue=1&calnbr=419.

1. DEC has Discretion Regarding Enforcement of the ECL, its Regulations, and Permit Conditions.

The Legislature gave DEC discretionary authority to enforce its enabling act, regulations, and permits. This assignment is typical in a system where, "[g]enerally, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches" (*Klostermann v Cuomo*, 61 NY2d 525, 535-536 [1984]). Courts do not "displace[]" executive officials in their "management of the public enterprises," and therefore the "questions of judgment, allocation of resources and ordering of priorities" that must be resolved by executive officials and administrative agencies are "inappropriate for resolution in the judicial arena" (*Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992 [1976]). For these reasons, "the judiciary is loathe to interfere with the executive department of the government in the exercise of its official duties, unless some specific act or thing which the law requires to be done has been omitted" (*Matter of Walsh v LaGuardia*, 269 NY 437, 441-442 [1936] [quotation marks and citation omitted]).

A court may only compel executive officials to perform "ministerial dut[ies]," which require no "exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]). And "[n]o court" can compel

executive enforcement to "prevent[] third parties from doing illegal acts" (*Walsh*. 269 NY at 442).

While a court's power to issue declaratory judgments is distinct in some respects from its power to compel executive action, both are bound by the doctrine of separation of powers.[2] Courts must always avoid "fashioning orders or judgments" that "intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (*Klostermann*, 61 NY2d at 541).

Enforcement discretion regarding solid waste management facilities is reserved to DEC. "The licensing and regulation of solid waste management facilities is a legislative function delegated to the DEC by statute" (*Flacke v Onondaga Landfill Sys*, 69 NY2d 355, 362 [1987]). The Legislature delegated DEC *discretionary* enforcement authority as to those facilities (*see* ECL § 71-2703[1] [DEC "may" revoke solid waste management permits and enjoin violations]; *id.* § 71-2727[3] [DEC "may" issue orders requiring solid waste

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[2] There is no distinction between plaintiffs' request for a judicial declaration that DEC's alleged failure to enforce has violated the Green Amendment and a request for an order compelling DEC enforcement action against Seneca Meadows. Plaintiffs have not described any way that DEC could comply with such a declaration except by taking enforcement action against Seneca Meadows.

management permittees to implement corrective actions and remedial measures]; *id.* § 71-2103[1] [DEC "may" enjoin violations of Title V air permits]; *see also* 6 NYCRR § 621.13[a] [DEC "may" modify or revoke Title V air permits]). When a court "substitute[s] its judgment for that of the agency," it "impermissibly restrain[s] . . . DEC from performing its statutory duty in violation of fundamental principles of separation of powers" (*Flacke*, 69 NY2d at 363).

There is no question that DEC exercises regulatory and enforcement authority as to Seneca Meadows. Seneca Meadows operates its landfill pursuant to DEC's Title V and solid waste management permits, the latter of which contains numerous specific conditions regarding odor containment and abatement (*See* compl. ¶ 24). And although DEC has not taken the type of enforcement action that plaintiffs seek, they acknowledge that DEC has taken enforcement action when Seneca Meadows has fallen short of its obligations (*See* compl. ¶ 66).

Moreover, the same concerns that lead courts to refrain from interfering with agency discretion apply here. DEC currently oversees more than 10,000 air, water, solid waste, and mining permits (*see generally* DEC Website, Permits, Licenses, and Registrations, *available at* https://dec.ny.gov/regulatory/permits-licenses). DEC is able to consider the

full scope of its regulatory obligations when it prioritizes enforcement efforts based on "the ever-shifting public-safety and public-welfare needs" of the State (*Texas v United States*, 599 US 670, 680 [1964]). If plaintiffs can compel DEC enforcement here, then plaintiffs and courts, rather than DEC, will set DEC's enforcement priorities. And they will do so based on individual lawsuits rather than an informed assessment of environmental priorities and enforcement needs across the State. The Legislature specifically sought to move beyond such *ad hoc* attempts to solve New York's solid waste disposal challenges when it gave DEC regulatory authority over solid waste management facilities (*see* L.1973, ch. 399, § 1 ["It is the purpose of this act to assure that solid waste management is conducted in a safe, sanitary, efficient, economic and environmentally sound manner *throughout the state* by providing a *unified regulatory framework* therefor] [emphasis added]; *see also* L. 1973, Ch. 399, NYS Legislative Annual, at 150 [Governor explaining that the Act was necessary to address the "increasing gravity of the solid waste problem" posed by "mushrooming" quantities of solid waste in the State]).

Plaintiffs cannot compel enforcement action against Seneca Meadows because "[e]nforcement of the laws cited by plaintiffs would involve some exercise of discretion" by DEC (*Alliance to End Chickens as Kaporos v New*

York City Police Dept., 32 NY3d 1091, 1093 [2018], *cert. denied*, 139 S. Ct. 2651 [2019]). Likewise, plaintiffs have no right to a declaratory judgment that DEC must take enforcement action against Seneca Meadows, because courts must "avoid" issuing judgments that "intrude" on discretionary decisions "reserved to the . . . executive branch" (*see Klostermann*, 61 NY2d at 541). The relief plaintiffs seek is constitutionally barred because judicial exercise of DEC's enforcement discretion would "violat[e] . . . fundamental principles of separation of powers" (Flacke, 69 NY2d 355, 363 [1987]; *see Jones v Beame*, 45 NY2d 402, 406 [1978] [courts accepting responsibility for the administration of executive branch programs would "violate the constitutional scheme for the distribution of powers among the three branches of government and involve the judicial branch in responsibilities it is ill-equipped to assume").

2. The Green Amendment Did Not Abrogate DEC's Enforcement Discretion.

The Green Amendment places a duty on *government actors* not to infringe on the rights protected by the amendment. It does not place affirmative obligations on government. Nothing in its text or history suggests the Green Amendment provides plaintiffs a constitutional right to mandate

DEC enforcement action against Seneca Meadows, which would violate the separation of powers. Thus, the complaint against DEC should be dismissed.

Instead, like the other rights in the bill of rights, the Green Amendment provides protection from government intrusion. Long before the Green Amendment was added, the Court of Appeals explained that New York's "Bill of Rights is designed to protect individual rights against the government" (*SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 502-503 [1985]). As examples of bills of rights protections, "the State and Federal constitutional guarantees of freedom of speech protect the individual against action by governmental authorities, not by private persons" (*Id.*, 66 NY2d at 502). So too with the federal Constitution's equal protection clause, which "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike" (*Nordlinger v Hahn*, 505 US 1, 10 [1992]). The Green Amendment is likewise a shield against government infringement.

Neither the text nor history of the Green Amendment provides a basis to depart from the "traditional usage and understanding" that bills of rights amendments protect against state action (*SHAD*, 66 NY2d at 500). The text of the Green Amendment stands in marked contrast to the language used in other constitutional provisions that mandate affirmative state action. The State is, for example, constitutionally required to provide a sound education

based on a provision expressly stating that "[t]he legislature *shall provide* for the maintenance and support of a system of free common schools" (NY Const art XI, § 1 [emphasis added]). It must also take affirmative action on behalf of the needy based on the provision setting forth that "[t]he aid, care and support of the needy are public concerns and *shall be provided by the state*" (*Id.* art XVII, § 1 [emphasis added]; *see also id.* art XVII, § 3 ["The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state"]). Unlike these provisions—none of which is housed in the Bill of Rights—the text of the Green Amendment contains no affirmative mandate.

And even setting aside these specific textual differences, plaintiffs' claimed right under the Green Amendment simply has no analog in New York's other constitutional amendments; no other constitutional provision mandates state enforcement against third parties. Indeed, even as to the most serious criminal acts under New York law, the constitution leaves executive officials their "broad [prosecutorial] discretion" (*People v Di Falco*, 44 NY2d 482, 486 [1978]).

The history of the adoption of the Green Amendment likewise supports the conclusion that DEC retains its enforcement discretion. During debate, Assembly Member Englebright, one of the bill's sponsors, explained that the

Green Amendment "does not change . . . any of the existing laws of the State" and that it altered "[n]othing" about DEC's regulatory role (NY Assembly Debate on Assembly Bill A1368, Feb. 8, 2021 at 35-36).[3] Co-sponsor Assembly Member Glick agreed that the Green Amendment "does not change the law" (*id.* at 66). And when Englebright was specifically queried about how the Green Amendment would interact with complaints about landfill odors, he explained that current regulation "isn't changed" by the Green Amendment and cited DEC's regulatory process and the legislative process as the proper avenues for additional solutions to the problem of the safe and environmentally sound disposal of solid waste (*id.* at 49-53). Even a representative from a district where a landfill is located, herself a co-sponsor of the bill, expressed her understanding that the Green Amendment would not "convey upon the citizenry any additional rights" but would instead ensure that future legislative bodies could not "roll back the good environmental progress" that the State had made (*id.* at 68-69; *accord id.* at 60 [Green Amendment will "put an onus on the Legislature to deliver to the residents of this State"]).

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[3] Assembly debate transcripts are publicly available at https://www.nyassembly.gov/PIO/.

To be sure, some *opponents* of the Green Amendment voiced concerns that it would transfer authority from the Legislative and Executive to the Judiciary. (*See e.g. id.* at 85-86). But comments from opponents of a bill provide poor evidence of legislative intent. Courts look to the sponsors of a bill when its meaning is in doubt (*Schwegmann Bros. v Calvert Distillers Corp.*, 341 US 384, 394 [1951]) rather than to opponents who "tend to overstate [the bill's] reach" in an effort to "defeat" it (*NLRB v Fruit and Vegetables Packers and Warehousemen, Local 760*, 377 US 58, 66 [1964]). None of the bill sponsors suggested that the Green Amendment would undermine separation of powers or override the Legislature's grant of enforcement discretion to DEC.

3. No Other States' Green Amendments Have Been Interpreted to Mandate State Enforcement Against Third Parties.

Plaintiffs' claim that the Green Amendment mandates DEC enforcement against Seneca Meadows finds no support in any other state's interpretation of its green amendment, even when the respective green amendment expressly places affirmative obligations on that state. Courts have interpreted language comparable to that in New York's Green Amendment as prohibiting government infringement on the protected rights.

They have not held that *any* green amendment compels state action against third parties.

Pennsylvania's green amendment contains two clauses, the first of which is comparable to New York's Green Amendment. The first clause gives Pennsylvanians "a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" (Pa Const art I, § 27). A second clause goes on to make that state a trustee of its natural resources and obligates it to "conserve and maintain" those resources. (*Id.*).

The Pennsylvania Supreme Court determined that the first clause "affirms a limitation on the state's power to act contrary to th[e stated] right" (*Robinson Twp. v Commonwealth*, 623 Pa 564, 646 [2013]). The clause imposes "an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action" (*id.* at 647; *see also Pa. Envtl. Def. Found. v Commonwealth*, 640 Pa. 55, 88 [2017]). So too does New York's Green Amendment constrain the State from itself unduly infringing upon the rights conferred.

Only the second clause of Pennsylvania's green amendment, which has no analogy in New York's Green Amendment, has been found to place an affirmative obligation on the State of Pennsylvania. And even as to the

second clause, Pennsylvania courts have rejected the argument that the affirmative duty placed on the state authorizes a court to compel government actions that were not mandatory under "legislative enactments or regulatory provisions" (*Funk v Wolf*, 144 A3d 228, 250 [Pa. Commonwealth Ct. 2016], *affd* 638 Pa 726 [2017]). Pennsylvania's green amendment thus offers no support for the argument that New York's Green Amendment abrogates DEC enforcement discretion.

Like Pennsylvania's, Montana's constitution guarantees the "right to a clean healthful environment," (Mont Const art II, § 3), and further directs that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations," (*id.* art. IX, § 1[1]). Montana's supreme court has found that these rights protect against government infringement (*see Clark Fork Coal. v Mont. Dep't of Nat. Res. & Conservation*, 403 Mont 225, 264 [2021] [emphasis added]), but no Montana court has ever found a right to compel state enforcement against alleged polluters.

B. Plaintiffs' Alternative Claim that State Action Causes the Alleged Odors Also Fails.

Plaintiffs allege as an alternative Green Amendment cause of action that the State is responsible for landfill odors because DEC regulates the

landfill. It is well settled, however, that government regulation does not transmute private action into state action, and plaintiffs' allegations are inconsistent with the criteria for attributing private action to the State.

Plaintiffs allege that the odors they experience violate their right to clean air because they are *prohibited* by DEC's regulations and permits and because DEC has not taken sufficient action to stop the alleged violations (*see* compl. ¶¶ 96-100 [alleging DEC failed to take action for violations of permit and 6 NYCRR § 211.1], 101-104 [alleging the same for permit and 6 NYCRR § 360.19(i)]). But for private action to be treated as state action for the purposes of New York's constitution, the offending private action must be state-"authorized private conduct" (*Sharrock v Dell Buick-Cadillac, Inc.*, 45 NY2d 152, 158 [1978]), not, as is the case here, conduct that allegedly violates DEC prohibitions contained in permits and regulations. Thus, plaintiffs' allegations contradict their claim that state action causes the alleged impermissible odors (*see Montalvo v Consolidated Edison Co. of N.Y.*, 92 AD2d 389, 395 [1st Dept 1983] [electric utility actions were not state actions where they were "in contravention rather than pursuant to State authorization"], *affd* 61 NY2d 810 [1984] [affirmed for reasons stated by the majority opinion of the appellate division]).

Plaintiffs' conclusory assertion that the presence of an onsite DEC monitor constitutes State participation in the landfill's operations also lacks merit (*see Rodriguez v Jacoby & Meyers, LLP*, 126 AD3d 1183, 1185 [3d Dept 2015] ["claims consisting of bare legal conclusions . . . are insufficient to survive a motion to dismiss"] [internal quotation marks and citation omitted]). Plaintiffs allege that the offending odors are caused by Seneca Meadows' acceptance and management of solid waste materials. (*See* compl. ¶ 2). They allege that DEC has failed to stop the odors, (*id.* ¶¶ 3, 59), not that DEC—or its monitor—generates them. The claims thus fail as a matter of law (*see Moghimzadeh v Coll. of Saint Rose*, 236 AD2d 681, 682 [3d Dept 1997]) ("more than mere State regulation of the private entity is required" for a constitutional claim that the private entity engages in state action).

C. Plaintiffs' Challenge to the DEC's Ongoing Permit Application Review is Unripe.

Plaintiffs also seek an injunction to stop DEC's ongoing review of Seneca Meadows' permit modification applications. As plaintiffs concede, DEC has not finished its review of the proposals. (*See* compl. ¶ 36). DEC's environmental review will contain multiple opportunities for public participation, during which plaintiffs can advocate to DEC for the results

they seek. As DEC has taken no action that prejudices plaintiffs, or that is subject to judicial review, the challenge should be dismissed as unripe.

A justiciable controversy requires a "present, rather than hypothetical, contingent or remote, prejudice to plaintiffs" (*American Ins. Assn. v Chu*, 64 NY2d 379, 383 [1985]). Ripeness is a "matter pertaining to subject matter jurisdiction" (*Matter of 54 Marion Ave., LLC v City of Saratoga Springs*, 162 AD3d 1341, 1344 [3d Dept 2018] [internal quotation marks, citation, and brackets omitted]), and a challenge "cannot be ripe [for judicial review] if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520 [1986]).

Plaintiffs are not prejudiced by DEC's ongoing review of Seneca Meadows' applications. DEC's most recent action is the issuance of an environmental impact statement scoping report – in essence an outline of the topics to be analyzed in a forthcoming environmental impact statement – (*see* Haley aff exh F), and a legal challenge to a "scoping report [is] premature" (*Matter of Vaughan v New York State Dept. of Transp.*, 223 AD3d 1010, 1012 [3d Dept 2024]; *see Adirondack Council, Inc. v Adirondack Park Agency*, 92 AD3d 188, 192 [3d Dept 2012] [holding challenge was unripe when "further SEQRA [was] required" before any trails could be built that might prejudice

the petitioners]). DEC has not completed its environmental review,[4] let alone approved any of the activities proposed in the applications. (*See* Haley aff ¶ 10). Plaintiffs' challenge should therefore be dismissed as unripe for judicial review (*see Matter of Guido v Town of Ulster Town Bd.*, 74 AD3d 1536, 1536-1538 [3d Dept 2010]).

POINT II

CORPORATE PLAINTIFFS LACK STANDING TO MAKE A GREEN AMENDMENT CLAIM

As a final matter, whatever the scope of the Green Amendment, the right it grants is clearly intended to protect the health of natural persons. Because corporations have no physical health, corporate plaintiffs lack standing to make a Green Amendment claim.

"Standing is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review" (*Matter of 61 Crown St., LLC v New York State Off. of Parks, Recreation & Historic Preserv.*, 207 AD3d 837, 839 [3d Dept 2022] [internal quotation marks and citations omitted]). "Standing requires a party to demonstrate both an injury-in-fact and an

[4] DEC's application review must also comply with numerous other statutory procedural requirements (*see generally* ECL article 70).

injury falling within the zone of interests or concerns sought to be promoted or protected" by the legal basis for the challenge (*Matter of Park Manor Rehabilitation & Health Care Ctr., LLC v Shah*, 129 AD3d 1276, 1277 [3d Dept 2015]).

The corporate plaintiffs in this case—a distributor of wine-closure products and an automobile repair business—have not alleged that the corporations themselves have suffered any injury, let alone one protected by the Green Amendment. Instead, they allege that their employees and customers are harmed by the landfill. (*See* compl. ¶¶ 13-16). But "[g]enerally a party has no standing to raise the legal rights of another," and corporate plaintiffs cannot establish the exception allowing third-party standing because it is not "impossible" for the employees or customers to assert their own rights (*Matter of Fleischer v New York State Liq. Auth.*, 103 AD3d 581, 583 [3d Dept 2013]).

And, in any event, corporations could never allege that they suffered an injury within the protection of the Green Amendment. Corporations are legal persons in some contexts, but they do not share in legal protections exclusive to natural persons (*see generally Matter of Nonhuman Rights Project, Inc. v Breheny*, 38 NY3d 555, 573 [2022] [explaining that only natural persons, and not corporations, have liberty interests]). The Green Amendment protects

human health, which is an interest exclusive to natural persons. Thus, the corporate plaintiffs' Green Amendment claims must be dismissed for the additional reason that they lack standing.

CONCLUSION

The Court should dismiss the action against DEC.

Dated: May 31, 2024
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