SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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| SENECA LAKE GUARDIAN, INC., et. al,<br><br>Plaintiffs,<br><br>– against –<br><br>SENECA MEADOWS, INC. and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,<br><br>Defendants. | Index No. 902866-24 |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SENECA MEADOWS, INC.'S MOTION TO DISMISS**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**State Constitutional Provisions**

**State Statutory Authorities**



**State Rules and Regulations**



**Other Authorities**

## INTRODUCTION

Plaintiffs cannot leverage the Environmental Rights Amendment of the New York Constitution ("ERA") to transform their grievances against the Seneca Meadows Landfill ("Landfill") into privately enforceable constitutional violations. Nor can they invoke the ERA to cut short the review of Defendant Seneca Meadows, Inc.'s ("SMI") permit application by Defendant New York State Department of Environmental Conservation ("NYSDEC"). The fifteen-word ERA creates no automatic rights to sue or to remedies because it is not self-executing, and it does not displace agency enforcement discretion or limits on constitutional claims against private parties.

The ERA—adopted in 2021—articulates a "right to clean air and water, and a healthful environment." N.Y. Const. art I, § 19. It offers no detail as to what these terms mean, or explanation as to how the amendment is to be implemented and enforced in an objective and consistent manner. This reflects the principle found in other New York constitutional provisions that the Legislature must implement the ERA through statutes and rules; it is not self-executing, and the Court's analysis of the ERA claims need not go further.

Regardless, the ERA could only apply to the actions of the State and its agencies. Absent express language, which the ERA does not contain, it cannot be used to challenge the actions of private parties. And Plaintiffs do not offer any factual allegations to equate SMI's operation of its Landfill with State action. With respect to Plaintiffs' claim against NYSDEC, to which SMI is a necessary party, courts have long recognized that agencies have absolute enforcement discretion. The ERA does not disturb this status quo, and Plaintiffs cannot compel enforcement action against SMI.

Likewise, Plaintiffs' demand that the Court enjoin issuance of a renewed permit for the Landfill is meritless and contravenes black letter administrative law. As Plaintiffs acknowledge,

NYSDEC's review of the permit renewal and modification application is ongoing. NYSDEC still must complete necessary reviews of potential environmental impacts, provide additional opportunities for public comment, and decide whether to deny the application or grant the permit (potentially with conditions). Plaintiffs have not pleaded the irreparable injury required to obtain their injunctive relief. Nor is Plaintiffs' request justiciable because it is not ripe, and they have not exhausted administrative remedies.

Plaintiffs' allegations of widespread impacts are also not viable under New York nuisance law, as multiple Appellate Divisions have dismissed similar private and public nuisance claims against landfills. A private nuisance affects only one or a relatively few people, not the many hundreds that Plaintiffs allege were harmed from the Seneca Meadows Landfill. And the two Plaintiffs claiming economic loss at their businesses cannot maintain a public nuisance claim where they assert the community of businesses surrounding the Landfill shares this harm.

Plaintiffs have no viable claims under the ERA or New York tort law, and their Complaint should be dismissed in its entirety.

## BACKGROUND

SMI owns and operates the Seneca Meadows Landfill, an important solid waste management and recycling facility located in Seneca Falls and Waterloo that serves much of New York State. Exhibit 1 to the Affirmation of M. Murphy, dated May 31, 2024 ("Murphy Aff."), Compl. ¶¶ 1, 23 (Mar. 25, 2024). Local, state, and federal agencies closely regulate the Landfill to ensure it is operating in accordance with its Part 360 solid waste management facility permit and Title V air permit. *Id.* ¶ 24. Among other measures, NYSDEC employs a full-time on-site inspector to monitor Landfill operations. *Id.* ¶ 55. As required by its permits, SMI mitigates odor potential through numerous large-scale engineering measures, including covering

waste and maintaining a gas collection and control system that also generates electricity from landfill gas. *Id.* ¶¶ 25, 60-63.

NYSDEC renewed SMI's Part 360 permit in 2017, with an expiration date of December 2025. *Id.* ¶¶ 27, 54-55. In July 2020, SMI applied to NYSDEC to renew and modify the Part 360 permit, seeking to add approximately 47 acres for waste disposal, increase the waste disposal capacity, and extend the life of the Landfill by approximately 15 years. *Id.* ¶¶ 28-29. The proposal would not change the types of or daily limits on accepted waste. Murphy Aff. Ex. 2, Final Scoping Document for Draft Environmental Impact Statement ("EIS") at 2 (Apr. 2024).[1]

NYSDEC has not yet made a final decision on the application because the permit review process is still underway. Compl. ¶¶ 28, 30-32, 36. With respect to the requirements under the State Environmental Quality Review Act ("SEQRA"), which must be satisfied before a permit decision may be made, NYSDEC issued in March 2022 a notice requiring the preparation of an EIS. *Id.* ¶¶ 28, 30. Several months later, NYSDEC issued a draft scoping document identifying "potentially significant adverse impacts" and other issues of relevance to the permit application to be addressed in the draft EIS ("DEIS"). 6 NYCRR 617.8; Compl. ¶¶ 31. Plaintiff Seneca Lake Guardian ("SLG") submitted comments on the draft scoping document. Compl. ¶ 34-35. The final scoping document was issued on April 10, 2024.[2]

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[1] Plaintiffs filed their lawsuit on March 25, 2024, before the scoping document was finalized. Compl. ¶ 36; NYSDEC, Notice of Availability of Final Scope, https://tinyurl.com/64bakcyf. The Court may take judicial notice of the final scoping document. *See Matter of Charles A. v. State of N.Y.*, 101 A.D.3d 1535, 1536 (3d Dep't 2012) (taking judicial notice of annual report on government website); *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20-21 (2d Dep't 2009).

[2] NYSDEC reviewed the approximately 600 comments received on the draft scoping document, and the final scoping document now includes "more robust requirements for additional evaluation in the DEIS sections on odors, air quality, water quality, human health visual impacts," as well as a new section related to human health. Murphy Aff. Ex. 2 at 3.

Many steps remain in the SEQRA process. The DEIS must be prepared and released for public review and comment, and NYSDEC can require public hearings on the DEIS. 6 NYCRR 617.2(n), 617.9(a)(3)-(4). Following the close of this public comment period, a final EIS ("FEIS") must be prepared and issued. 6 NYCRR 617.9(a)(5). NYSDEC must provide a reasonable period for the public to consider the FEIS before it issues a SEQRA findings statement that certifies that the action "avoids or minimizes adverse environmental impacts to the maximum extent practicable," including by requiring mitigation measures. 6 NYCRR 617.11(a), (d); *see also* ECL § 8-0109(8). Only then does the SEQRA process conclude.

In addition to SEQRA's obligations, NYSDEC must follow certain steps before deciding the permit application:

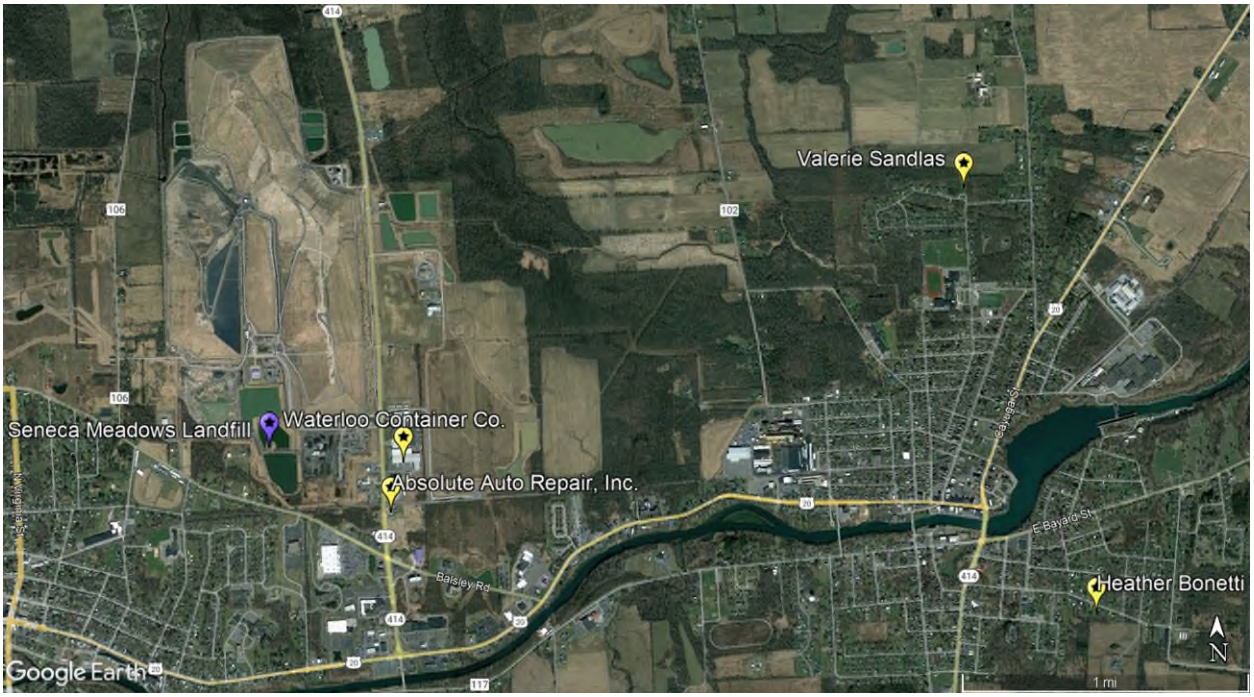
- Requiring SMI to provide detailed information on the application, including demonstrating compliance with New York's Climate Leadership and Community Protection Act. 6 NYCRR 621.3.
- Publishing notice that the permit application is complete and providing an opportunity for public comment. 6 NYCRR 621.7.
- Ensuring SMI completes engagement on environmental justice issues, including by hosting community meetings at which the public may provide comments. NYSDEC Commissioner Policy 29, Environmental Justice and Permitting (2003).[3]
- Potentially requiring public comment hearings or adjudicatory hearings on the permit application. 6 NYCRR 621.8.

Only after following these steps, completing the SEQRA process, and considering public comments can NYSDEC issue a permit with or without conditions or deny the application. 6 NYCRR 621.10(a); 6 NYCRR 617.11(c).

Rather than wait for this permit review process to conclude, Plaintiffs filed this lawsuit in March 2024, alleging violations of New York's ERA and bringing private and public nuisance

[3] Plaintiffs have participated in these meetings. Compl. ¶ 33.

claims. Plaintiffs assert that odors from the Seneca Meadows Landfill have caused widespread nuisance impacts and violate their undefined "right to clean air and a healthful environment." Compl. ¶¶ 71, 79, 93, 104. They seek damages, an order requiring the "abatement of odors and vectors," and injunctive relief requiring the denial of SMI's pending permit application. *Id.* at 18-19. Plaintiffs include environmental organizations, businesses, and residents, some of whom live over 2.1 to 2.6 miles from the Landfill (see below).[4]




**LEGAL STANDARD**

A complaint is appropriately dismissed when it fails to state a claim, based on the documentary evidence, or when the court does not have subject matter jurisdiction. CPLR 3211(a)(1)-(2), (7). Though plaintiffs' allegations are presumed true on a motion to dismiss, "conclusory allegations—claims consisting of bare legal conclusions with no factual

[4] *Ryabaya v. City of New York*, 220 A.D.3d 903, 904 (2d Dep't 2023) (affirming Supreme Court's judicial notice of Google Maps image); *Connor v. City of New York*, 29 Misc. 3d 1208(A) (Sup Ct. N.Y. Cty. 2010) (taking judicial notice of map locations).

specificity—are insufficient." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009); *see also McNeary v. Niagara Mohawk Power Corp.*, 286 A.D.2d 522, 525 (3d Dep't 2001) (dismissing nuisance claim due to "conclusory and vague" allegations). Thus, dismissal "is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).

## ARGUMENT

### I. The ERA is not self-executing because it provides no rule governing its implementation and enforcement (Counts III and IV).

Because the ERA confers a "right to clean air and water, and a healthful environment," without any specificity regarding the scope of that right or its implementation and enforcement, it is not self-executing.[5] N.Y. Const. art I, § 19. A constitutional provision is not self-executing, and requires implementing legislation, when "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." *Davis v. Burke*, 179 U.S. 399, 403 (1900) (quotation omitted); 20 N.Y. Jur. 2d Constitutional Law § 41 (2024) ("absence of specificity in a constitutional provision may prevent it from being self-executing").

The now-repealed constitutional provision concerning responsibility for bank debts demonstrates this controlling principle.[6] The Court of Appeals held that this provision was not

[5] The Court should decide now the threshold issue of self-execution, which controls whether Plaintiffs may proceed with their claims under the ERA. Only if the ERA is self-executing will the Court need to delve into when and against whom an ERA claim may proceed. Deciding the issue of self-execution will also serve judicial economy given the potential for similar lawsuits in New York. For example, if the Court dismisses the request to enjoin permit issuance based on, *inter alia*, failure to exhaust administrative remedies, *see infra* Section III, without addressing self-execution, Plaintiffs will likely bring new claims under the ERA if NYSDEC ultimately issues the permit—claims that still will not be viable because the ERA is not self-executing.

[6] "The stockholders of every corporation and joint stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such

self-executing because it was "couched in general terms" and did not describe the enforcement of the stockholders' liabilities or define "stockholder," leaving it ambiguous as to what category of people it applied. *Broderick v. Aaron*, 268 N.Y. 260, 263-64 (1935); *Broderick v. Weinsier*, 278 N.Y. 419, 423-26 (1938). As a result, "statutes were necessary to define what the Constitution has left undefined." *Weinsier*, 278 N.Y. at 426.

Similarly, the Court of Appeals in 1990 reiterated that the civil rights clause of article I, § 11 in the state constitution is not self-executing, and "prohibits discrimination only as to civil rights which are 'elsewhere declared'" in law. *People v. Kern*, 75 N.Y.2d 638, 651 (1990) (citing *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531 (1949)).

The ERA also provides only a general statement of environmental rights—offering no explanation of what "clean air" and "healthful" mean, much less how they are defined or enforceable at law. The ERA's legislative history sheds no light on this question and underscores the vagueness of "clean air and water" and a "healthful environment." Assemblyman Steve Englebright, the primary sponsor, offered an entirely subjective definition: "I believe that the words 'a clean and healthful environment' is something that each of us would know when we experience it, unless we get sick afterwards. In which case . . . we would know that we had been exposed to something . . . in that environment." Murphy Aff. Ex. 3, NY Assembly Tr., Apr. 30, 2019, at 35-36; *see also* Murphy Aff. Ex. 4, NY Assembly Tr., Apr. 24, 2018, at 47 ("Clean basically means that if you are interacting with the environment that you're not being harmed; that if you are consuming water that it does not have poison; if you are breathing air, it is not

corporation or association, for all its debts and liabilities of every kind." 1894 N.Y. Const., art. VIII, § 7; 1846 N.Y. Const., art. VIII, § 7.

contaminated and will not have a negative impact on the biology of yourself or your loved ones.").

Only the Legislature can formulate rules for the consistent implementation and enforcement of the ERA—e.g., defining the "clean" and "healthful" standards, identifying the specific chemicals that may interfere with those standards, and determining the levels of those chemicals that could result in adverse effects. *See Weinsier*, 278 N.Y. at 426. The legislative history of the ERA again supports this conclusion, as the primary sponsor recognized the need for legislative action and saw the ERA as being aspirational for state policy. When asked whether the ERA "drop[ped] the role of the Legislature" because it did not include specific language directing the Legislature to implement the policy, Assemblyman Englebright stated, "[t]hat is not correct." Murphy Aff. Ex. 5, NY Assembly Tr., Feb. 8, 2021, at 82-84. He explained that the ERA is intended to "frame the expectations of the State government" and citizens, and that the Legislature and State agencies would "make recommended new law" and policy to implement the amendment. *Id.* at 34-35, 39, 51-52; *see also id.* at 79-80 (Assemblyman Englebright explained the ERA is "not intended to speak to any particular measure" but "provide context"). Thus, it is the duty of the Legislature, not the courts, to implement the ERA and decide the standards against which to measure State conduct. *See Weinsier*, 278 N.Y. at 426.[7]

[7] The trial court in *Fresh Air for the Eastside, Inc. v. State*, whose decision is nonbinding and currently on appeal before the Fourth Department, wrongly decided the self-execution issue. Citing a law school article, the court summarily determined that the ERA is enforceable without additional legislation because it does not explicitly reference further action by the Legislature. No. E2022000699, 2022 WL 18141022, at *7 (Sup. Ct. Monroe Cty. Dec. 20, 2022). However, courts have found that even where constitutional provisions do not include this specific language, they are not self-executing where (like the ERA) they lack specificity—differentiating them from other constitutional provisions that provide detailed instructions for their implementation or were modeled on federal constitutional provisions. *Compare Kern*, 75 N.Y.2d at 651 (civil rights clause not self-executing) *and Weinsier*, 278 N.Y. at 426 (former amendment concerning bank debts not self-executing) *with* N.Y. Const. art. XIV, § 1 (providing detail on amendment's

Other New York constitutional provisions likewise recognize that it is the duty of the Legislature to protect natural resources and public health. N.Y. Const. art. XIV, § 4 (the Legislature should provide for "the abatement of air and water pollution," among other measures); *id.* art. XVII, § 3 (the Legislature shall provide for the "protection and promotion" of public health). The ERA was intended to complement these provisions, as Assemblyman Englebright explained, not displace the role of the Legislature by leaving it to the courts to determine how to best protect human health and the environment. Murphy Aff. Ex. 5 at 82-83. This is consistent with long recognized principles in New York of separation of powers and judicial restraint, under which courts "abstain from venturing into areas" where they are "ill-equipped to undertake the responsibility and other branches of government are far more suited to the task." *Jones v. Beame*, 45 N.Y.2d 402, 409 (1978).

The ERA is not self-executing because it does not provide definitions, operational details, or other objective guidance that would allow it to be interpreted and applied in a principled and fair way that gives guidance to the regulated community. The Legislature has decades of experience in crafting environmental laws and is poised to pursue the goals of the ERA. That is not the role of private litigants and judges. Plaintiffs' ERA claims should be dismissed.

**II. The ERA does not empower Plaintiffs to challenge private operations or undermine an agency's enforcement discretion.**

The ERA is not self-executing, which is dispositive of Counts III and IV. Moreover, the ERA could only be intended to serve as a check on government conduct—meaning the

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purpose and objectives, and including specific enforcement mechanisms in article XIV, § 5) *and Brown v. State of N.Y.*, 89 N.Y.2d 172, 188, 190-91 (1996) (constitutional provisions at issue were "hardly new," and were modeled on federal Equal Protection Clause and Fourth Amendment). The *Fresh Air* court did not address these cases in deciding whether ERA is self-executing and did not explain how courts could interpret the broadly worded ERA in a consistent manner without legislative guidance.

legislative and executive actions of the State and its governmental subdivisions. The ERA does allow claims against private parties for alleged nuisance conditions, as it is silent regarding its applicability to private actors. Nor does the ERA allow Plaintiffs to compel NYSDEC to take enforcement action against SMI, particularly as courts have long recognized the agency's expertise and discretion in this area.

**A. The ERA is not enforceable against a private party (Count III).**

SMI's private operation of the Landfill is not government conduct, and Plaintiffs are not constitutionally entitled to seek relief under the ERA directly against SMI. The New York Constitution defines and limits "the powers of State government." *SHAD All. v. Smith Haven Mall*, 66 N.Y.2d 496, 502-05 (1985) (free speech amendment "protect[s] the individual against action by governmental authorities, not by private persons"). The Constitution is not enforceable against private parties absent express language allowing that dramatic step. *Id.*

This limitation on constitutional claims is evident when comparing the civil rights clause of article I, § 11 with the equal protection clause of that same section and the freedom of religion clause of article I, § 3 of the New York Constitution. The civil rights clause explicitly prohibits discrimination "by any other person or by any firm, corporation, or institution," in addition to by the State and agencies. N.Y. Const. art. I, § 11. Courts have thus held that this language prohibits State and private discrimination as to civil rights. *See Kern*, 75 N.Y.2d at 651. By contrast, the equal protection clause contains no such language and applies only to government action. *Id.* at 653. The freedom of religion clause likewise does not expressly encompass private actors, and courts have interpreted it to only limit government conduct. *See Matter of Kempf*, 252 A.D. 28, 32 (4th Dep't 1937).

The ERA also does not explicitly regulate private conduct. It thus only applies to government action and does not reach SMI's private operation of its Landfill. *See Fresh Air*, 2022 WL 18141022, at *8 (no ERA claim directly against private entity operating landfill).

Apparently recognizing this, Plaintiffs allege "SMI's acts and omissions are so entwined with governmental policies and are so governmental in nature that they constitute governmental action," Compl. ¶ 93, but missing are any facts indicating State action *by* SMI. "Mere State regulation of a private entity is insufficient" to establish that private activity constitutes government action, even where the regulatory scheme is extensive and detailed. *Moghimzadeh v. Coll. of Saint Rose*, 236 A.D.2d 681, 681-82 (3d Dep't 1997) (no State action shown where private college was subject to regulation and inspection by the Board of Regents); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 358-59 (1974) (operation of heavily regulated, privately owned utility did not involve State action).

Operation of the Seneca Meadows Landfill is not State action simply because SMI was issued a permit by NYSDEC, or because the Landfill is "overseen and regulated by NYSDEC." Compl. ¶¶ 90-92; *see also Downs v. Town of Guilderland*, 70 A.D.3d 1228, 1231 (3d Dep't 2010) (police officer's enforcement of rights of private property owner and annual payment pursuant to special use permit not State action). And Plaintiffs have not pleaded any other NYSDEC involvement in the operation of the Landfill that could constitute government action by SMI. Accordingly, the Court should dismiss Plaintiffs' ERA claim against SMI (Count III).

**B. The ERA does not weaken or supplant NYSDEC's enforcement discretion (Count IV).**

The ERA does not and cannot force NYSDEC to take specific enforcement action against third parties.[8] Compl. ¶¶ 94-107. New York courts by law respect agency authority and experience in areas involving judgments that an agency "possesses the discretion and expertise to make." *Nat. Res. Def. Council, Inc. v. New York State Dep't of Envtl. Conservation*, 25 N.Y.3d 373, 397 (2015) (refusing to interfere with "reasonable judgments" of NYSDEC in issuing Clean Water Act permit). Questions regarding an agency's exercise of enforcement discretion are particularly "inappropriate for resolution in the judicial arena," and courts decline to compel enforcement of a law or regulation. *Kerness v. Berle*, 85 A.D.2d 695, 695-96 (2d Dep't 1981) (dismissing proceeding to compel NYSDEC to enforce laws, as exercise of statutory duties involve "questions of judgment, discretion and allocation of resources and priorities"), *aff'd*, 57 N.Y.2d 1042 (1982); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency has "absolute" enforcement discretion, and decisions not to enforce are generally unsuitable for judicial review).[9] This Court should do so too with respect to Plaintiffs' enforcement claim under the ERA.

[8] While the ERA cannot be enforced directly against a private party (Count III), to the extent Plaintiffs' Count IV proceeds, SMI as the permittee and owner of the Landfill is a necessary party to Count IV and must be heard to the extent Plaintiffs seek relief that directly or indirectly curtails or impacts SMI's Landfill operations. *See Llana v. Town of Pittstown*, 234 A.D.2d 881, 883-84 (3d Dep't 1996) (in action to invalidate subdivision approvals and enjoin construction, homeowners were necessary parties because they could be "inequitably affected by a judgment"); *Baker v. Town of Roxbury*, 220 A.D.2d 961, 963 (3d Dep't 1995) (property owner and license holder necessary party in proceeding seeking rescission of that license).

[9] *See also Cmty. Action Against Lead Poisoning v. Lyons*, 43 A.D.2d 201, 203 (3d Dep't 1974) (county health department could not be compelled to take enforcement action to address lead paint hazards), *aff'd sub nom*, *Stratton v. Lyons*, 36 N.Y.2d 686 (1975); *All. to End Chickens as Kaporos v. New York City Police Dep't*, 152 A.D.3d 113, 114, 118-20 (1st Dep't 2017)

NYSDEC has long possessed broad discretion to enforce its regulations and permits, and courts may not interfere with that discretion. *See, e.g.*, ECL §§ 71-2703(1) (NYSDEC "may" revoke solid waste management permit or enjoin violations), 71-2727 (NYSDEC "may" require solid waste management permittees to implement remedial measures or corrective actions).[10] Nothing in the ERA suggests that it was intended to abrogate this enforcement discretion, and its legislative history confirms that the amendment was not intended to impose "any restrictions on the delegation of authority [given to NYSDEC] to do [its] work in protecting our air and our water." Murphy Aff. Ex. 3 at 29. Plaintiffs thus cannot bring a claim under the ERA to force NYSDEC to take a specific enforcement action against SMI, and their claim should be dismissed.[11]

**III. Plaintiffs' request to enjoin NYSDEC from completing its review of SMI's permit application has no basis under New York law.**

Citing an undefined "legal duty" and oblivious to SMI's right to have its permit application considered in accordance with statutory and regulatory process, Plaintiffs ask the Court to enjoin NYSDEC from issuing SMI a permit before the agency has made any

(plaintiffs could not compel city to enforce law and regulations, as this decision implicated its "reasoning and discretion"), *aff'd*, 32 N.Y.3d 1091 (2018).

[10] Plaintiffs recognize that NYSDEC has enforced its regulations, including by imposing special conditions in the Landfill permit and requiring an on-site monitor. Compl. ¶ 55.

[11] Plaintiffs are not without recourse. A party may petition NYSDEC to modify, suspend, or revoke a permit, and NYSDEC is obligated to consider that petition. 6 NYCRR 621.13(b). NYSDEC also provides multiple avenues for reporting violations or concerns. NYSDEC, *Report an Environmental Violation or Problem*, https://dec.ny.gov/environmental-protection/report-a-problem (last visited May 31, 2024).

challengeable determination.[12] Compl. ¶¶ 105-07. Plaintiffs' demand violates virtually every principle of administrative law and justiciability and should be summarily rejected.

Compelling agency action is an "extraordinary remedy" that typically must be sought through an Article 78 proceeding. *Kane v. Walsh*, 295 N.Y.198, 205-06 (1946) (dismissing request to enjoin fire commissioner from enforcing regulation as plaintiffs could seek relief under Article 78). A mandatory injunction is permissible only "when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong." *Id.* (quotation omitted); *see also Town of Guilderland v. Swanson*, 29 A.D.2d 717, 719-20 (3d Dep't 1968) (no mandatory injunction without irreparable injury); *Malik v. Higgins*, 173 A.D.2d 791, 792 (2d Dep't 1991) (injunction denied absent irreparable injury, and plaintiff had "an adequate remedy" to review agency determination in Article 78 proceeding). Cognizant of the constitutional distribution of powers among the branches of government, New York courts will not interfere with an agency's administration of its programs. *See Brennan Ctr. for Justice at NYU Sch. of Law v. N.Y. State Bd. of Elections*, 159 A.D.3d 1301, 1304 (3d Dep't 2018) (issues raised "involve matters of discretion and policy that have been expressly entrusted to another branch of government and are 'beyond the scope of judicial correction.'" (quoting *Jones*, 45 N.Y.2d at 408)).

[12] SMI's permit application is governed by existing statutes and regulations that give private plaintiffs no right to bring an action to derail the permitting process. *See* Uniform Procedures Act, ECL § 70-0101 *et seq.*, and statutory provisions governing solid waste management facilities, ECL § 27-0701 *et seq*. For example, in the event of a permit denial, NYSDEC, not a court, is statutorily directed to "provide to the applicant a written statement of the reasons for this determination." ECL § 27-0707(4); *see also* 6 NYCRR 621.10(a). And if that happens, the permit applicant has an opportunity to challenge permit denial in an adjudicatory proceeding before an administrative law judge. 6 NYCRR 621.10(h). The Court should not interfere with this lawful administrative process.

The extraordinary remedy of a mandatory injunction is not available here. Plaintiffs concede NYSDEC is in the relatively early stages of reviewing SMI's permit application, is considering comments from the public, and has not yet determined whether to grant the application, deny it, or issue a permit with conditions. Compl. ¶¶ 28-36; 6 NYCRR 621.10(a). Because the permit review process is incomplete, Plaintiffs cannot allege the irreparable injury needed for injunctive relief. Plaintiffs also have not shown ripeness or exhausted administrative remedies.

**A. An incomplete administrative process cannot support irreparable injury for injunctive relief.**

To obtain injunctive relief enjoining issuance of the Landfill permit, Plaintiffs must allege irreparable injury that is "threatened and imminent," rather than "contingent upon events which may not come to pass." *1130 President St. Corp. v. Bolton Realty Corp.*, 300 N.Y. 63, 69 (1949) (injunctive relief denied; no "threat of interference" with possession of property shown); *New York State Inspection, Sec. & Law Enf't Emps., Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 240 (1984) (vacating injunction where harm was contingent on future actions); *see also Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995) (concern about impact of business on commercial district was not imminent irreparable injury). They have not done so here. Numerous steps remain before NYSDEC can decide the permit application, and Plaintiffs have not alleged facts showing that harm will necessarily result from a decision that has not occurred.

Plaintiffs assert, without factual support, that the permit application "will cause increased harm to Plaintiffs, continuing and exacerbating the nuisance and violating Plaintiffs' rights under" the ERA. Compl. ¶ 106; *Godfrey*, 13 N.Y.3d at 373 (dismissing complaint where plaintiffs offered only conclusory allegations about impact of executive order). This outcome is

not certain or even likely. Plaintiffs admit that assessments of the potential effects of the permit application are underway, and they have provided comments requesting analyses of odors and other alleged Landfill impacts on the community. Compl. ¶¶ 31-35. Plaintiffs have asked NYSDEC to identify options to reduce the need for landfill capacity, analyze "odor complaints to determine whether they are related to decomposition gas or another source," study the use of technology and other options to "objectively evaluate odor issues," and consider using modeling, field and lab olfactometry, and other tools to "identify odor sources and intensity." *Id.* ¶ 35. As NYSDEC follows the regulatory procedures for reviewing the application, Plaintiffs will have more opportunities to make their voices heard regarding the alleged Landfill impacts. Depending on its findings, NYSDEC could issue a permit with conditions to address Plaintiffs' concerns, which Plaintiffs acknowledge NYSDEC has previously done to address potential odors. *Id.* ¶ 55 (asserting that the prior Landfill permit incorporated seven "special conditions intended to" control odors).

Because Plaintiffs are simply speculating that *any decision* on the permit application—even one that considers the types of impacts alleged in this action—will cause harm, their request to enjoin issuance of the Landfill permit should be dismissed for failure to allege irreparable injury. *See Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1538 (3d Dep't 2010) (dismissing request for permanent injunction for failure to allege irreparable harm); *McNeary*, 286 A.D.2d at 525 (similar).

**B. Plaintiffs' request for injunctive relief is not ripe for review, and Plaintiffs have failed to exhaust administrative remedies.**

Principles of ripeness and exhaustion of administrative remedies similarly require dismissal of Plaintiffs' request for injunctive relief. Plaintiffs here do not ask the Court to review or enjoin a final SEQRA determination or permit decision, causes of action potentially

cognizable in an Article 78 proceeding. Rather, Plaintiffs want the Court to halt NYSDEC's review of SMI's application and deny the permit before the agency has even fully considered it. Compl. ¶¶ 105-07. In the absence of a NYSDEC permit decision, there is no justiciable controversy for the Court to address.

A claim is not ripe for review when "'the anticipated harm is insignificant, remote or contingent [and] if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" *Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190 (3d Dep't 2012) (quoting *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986) (claim not ripe; effect of law on plaintiff was "incomplete and undetermined" since agency had not acted on request for approval of rebuilding program)). Plaintiffs' claim is not ripe.

Plaintiffs similarly failed to exhaust their administrative remedies before filing this action. *See Connor v. Town of Niskayuna*, 82 A.D.3d 1329, 1330 (3d Dep't 2011) (petition dismissed for failure to exhaust administrative remedies). Even where a constitutional violation is alleged, a party cannot avoid following "established administrative procedures that can provide adequate relief," particularly where the agency has not yet established the factual record necessary to review that claim. *Sabino v. DiNapoli*, 90 A.D.3d 1392, 1393-94 (3d Dep't 2011) (quotation omitted) (petition dismissed; interpretation of regulations was "best left in the first instance to the administrative agency"). Exhaustion ensures the agency has an opportunity to "develop a complete record which reflects the agency's expertise and judgment" before the court considers a claim. *Tennebaum v. Axelrod*, 128 A.D.2d 968, 969 (3d Dep't 1987).

NYSDEC is currently developing the record regarding SMI's application and has not made a final decision under SEQRA or regarding issuance of the permit. Plaintiffs' pleading

concedes this. *See, e.g.*, Compl. ¶¶ 28-36. Plaintiffs, and other members of the public, have multiple opportunities to be heard on the permit application, including following issuance of the DEIS and notice of complete application and potentially at hearings on the DEIS and application. 6 NYCRR 617.9(a)(3)-(4), 621.7, 621.8. And any conditions that could be included in a permit issued by NYSDEC are unknown. If a permit is issued, Plaintiffs may challenge NYSDEC's determination in an Article 78 proceeding.

The harms alleged by Plaintiffs are speculative because they depend on future actions of NYSDEC, and there is no justiciable controversy for the Court to decide. *See Vill. of Pelham Manor v. Crown Commc'n New York, Inc.,* 222 A.D.3d 804, 805-07 (2d Dep't 2023) (dismissing complaint seeking to enjoin construction of telecommunications tower; action not ripe where SEQRA process regarding tower installation not concluded and final determination by state not made); *Int'l Condo. Corp. v. N.Y. Tel. Co.*, 46 A.D.2d 719, 719 (3d Dep't 1974) (demand for permanent injunctive dismissed where plaintiffs did not exhaust administrative process).[13] The ERA does not allow Plaintiffs to ignore constitutional guardrails designed to ensure that courts respect the province of other branches of government. Plaintiffs' demand to enjoin permit issuance should be dismissed.

**IV. Widespread harm is not actionable in private nuisance (Count I).**

Allegations that odors caused widespread harm are incompatible with a private nuisance claim under New York law. Unlike a public nuisance that causes harm to a "considerable number" of people, a private nuisance interferes with the use and enjoyment of property by "one

[13] *See also Lemmon v. Seneca Meadows, Inc.*, 46 Misc. 3d 1215(A), *6 (Sup. Ct. Seneca Cty. 2015) (alleged violation of mining permit dismissed for failure to exhaust administrative remedies and for lack of ripeness, as NYSDEC must first decide potential amendment to mining permit).

person or a relatively few." *Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 (1977) (citing Chief Judge Cardozo's holding in *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 344 (1928), that a private nuisance "threatens one person or a few"). The Third Department reiterated this limitation on private nuisance claims in *Davies v. S.A. Dunn & Co.*, 200 A.D.3d 8, 11 (3d Dep't 2021), a landfill odor nuisance case.

Citing *Davies*, the Fourth Department recently dismissed a private nuisance claim in an analogous case alleging widespread harm from landfill odors. *William Metrose, Ltd. v. Waste Mgmt. of N.Y., LLC*, 225 A.D.3d 1223, 1223-24 (4th Dep't 2024). A real estate developer asserted that odors from the landfill diminished its property values and caused lost profits and reputational harm. *Id.* Because the allegations "indicate[d]" that odors "affected a large number of community residents," not one person or a relatively few people, the court held that the private nuisance claim was not viable. *Id.* at 1224; *see also Cedar & Wash. Assocs., LLC v. Bovis Lend Lease LMB, Inc.*, 95 A.D.3d 448, 449 (1st Dep't 2012) (private nuisance claim brought by single plaintiff dismissed because "the alleged nuisance affects a wide area").

As in *Metrose*, Plaintiffs here allege harm to far more than one or a few people. They assert that odors have impacted the surrounding area, even affecting neighborhoods over 2.5 miles away from the Landfill. Compl. ¶¶ 17-20, 32, 49-52; *see also* Compl. ¶¶ 3, 66-67 (alleging NYSDEC has failed to protect the "local communities" from harm). Plaintiffs further allege that odors have resulted in "hundreds" of complaints from the nearby communities and interfered with the "rights of the public at large." Compl. ¶¶ 37-38, 42, 49-52, 69.[14] Under *Copart*, *Davies*,

[14] SLG similarly asserted in its comments on the draft scoping document that the Seneca Meadows Landfill is "producing odors that are causing a nuisance in the surrounding community." Murphy Aff. Ex. 6, Letter Submitted on Behalf of SLG and Other Entities at 15 (Jan. 27, 2023) (cited at Compl. ¶¶ 34-35). The Court may consider this letter on a motion to dismiss, as it was referenced in the Complaint. *See All. Network, LLC v. Sidley Austin LLP*, 43

and other New York authorities, this alleged widespread harm is not cognizable in private nuisance.

**V. Plaintiffs' private action for public nuisance is not viable because they have not pleaded special injury (Count II).**

Plaintiffs Waterloo Contractors, Inc. ("Waterloo Contractors") and Absolute Auto Repair, Inc. ("Absolute") allege that odors and gulls have interfered with their business operations and caused economic losses. Compl. ¶¶ 79-82, 86. But fatal to their public nuisance claim, they also assert these harms are shared by the community of businesses surrounding the Seneca Meadows Landfill. *Id.* ¶¶ 3, 10, 38, 49-53. New York courts have conclusively held that this is not the special injury required for private plaintiffs to prosecute a public nuisance and have done so in recently in landfill nuisance cases similar to the claims here.

Public nuisance requires a "substantial interference with the exercise of a common right." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292 (2001). To avoid the "multiplicity of lawsuits that would follow if everyone were permitted to seek redress" for a public harm, it is typically actionable by a government agency. *Id.* "Government enforcement is particularly apt for such a highly regulated activity as operating a landfill." *Davies*, 200 A.D.3d at 12. Private plaintiffs may only bring a public nuisance claim where they allege "special injury" that differs in kind, not merely in degree, from that of the community. *532 Madison*, 96 N.Y.2d at 294 (no special injury where economic loss was common to the community of businesses, professionals, and residents). An injury is not special where it is "so

Misc. 3d 848, 852, n.1 (Sup. Ct. N.Y. Cty. 2014); *Deer Consumer Prods., Inc. v. Little*, 32 Misc. 3d 1243(A), *4 (Sup. Ct. N.Y. Cty. 2011) (considering documents from website referenced in complaint).

general and widespread as to affect a whole community, or a very wide area within it." *Id.* at 293 (quotations omitted).

To determine whether plaintiffs have alleged an injury different in kind from that of the community (i.e., a special injury), courts must first determine the "relevant scope" of that community. *Davies*, 200 A.D.3d at 12. In *Davies* and *Duncan v. Capital Region Landfills, Inc.*, 198 A.D.3d 1150 (3d Dep't 2021), each of which involved allegations that landfill odors harmed property rights, two separate panels in the Third Department confirmed that the community is defined by the type of injury alleged in the complaint. In evaluating special injury, the court rejected plaintiffs' expansive view that the community included "all members of the public who [came] into contact with the noxious odors" or the "general public," so that the allegedly affected residents made up only a portion of that community. *Davies*, 200 A.D.3d at 12–14 (explaining the Court of Appeals "has taken a different, more limited approach"). The court instead compared plaintiffs' purported injuries of property value diminution and interference with use and enjoyment to those of "other homeowners and renters impacted by the landfill's odors." *Id.* at 15. As this alleged harm was "essentially the same" for these residents, plaintiffs did not have a special injury and could not bring a private action for public nuisance. *Id.* at 10, 15–16; *Duncan*, 198 A.D.3d at 1150–51.

In *Metrose*, the Fourth Department applied *Davies*' correct framing of special injury in concluding that a real estate developer could not pursue a public nuisance claim for landfill odors. 225 A.D.3d at 1223-25. Allegations that odors diminished property values, leading to lost profits, reputational harm, and other economic losses, did not constitute special injury because the "entire community of property owners" purportedly experienced property value diminution.

*Id.* The fact that the developer owned more of these properties, causing it a "greater degree" of harm, did not impact this holding. *Id.*

In rejecting private plaintiffs' public nuisance claims for landfill odors, the Third and Fourth Departments relied on the Court of Appeals' decision in *532 Madison*. The Court there concluded that while building collapses and street closures in midtown Manhattan interfered with the "right to use the public space," plaintiffs did not allege special injury because the entire community of businesses and residents experienced economic losses. 96 N.Y.2d at 292–94; *see also Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 334–35 (1983) (increased expenses and lost profits not a special injury because economic damages were common to community of businesses and professionals).

Based on *532 Madison*, *Davies*, *Duncan*, and other New York authorities, the relevant community here is limited to businesses surrounding the Landfill. Plaintiffs allege that this entire community (not just Waterloo Containers and Absolute) have experienced economic harm due to odors and other impacts from the Landfill. *See, e.g.*, Compl. ¶¶ 3, 10 (asserting that members of SLG operating businesses around the Landfill "are adversely affected" by odors), 38, 49-53 (alleging the Landfill has negatively impacted tourism-related jobs and general job growth); *see also* Murphy Aff. Ex. 6 at 23-24 (asserting that the Landfill harms the tourism industry and area businesses, and requesting evaluation of economic harm to the surrounding community, including from lost business). Ultimately, the harms alleged by Waterloo Containers and Absolute are not unique or "special" and cannot, as a matter of law, form the basis of a public nuisance claim.

## CONCLUSION

The ERA requires further action from the Legislature before it can be implemented, much less enforced by a private litigant against other private parties and the State. The ERA creates no

new avenues for interfering with the operations of a privately run landfill, NYSDEC's enforcement discretion, or an ongoing permit review process. The Third Department's decisions in *Davies* and *Duncan*, and the Fourth Department's decision in *Metrose*, have also foreclosed Plaintiffs' nuisance claims from proceeding further. Plaintiffs' Complaint should be dismissed in its entirety.

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**CERTIFICATION OF COMPLIANCE**

I certify that this document complies with the word count limit of 22 NYCRR 202.8-b(a) because it contains 6,987 words, excluding the parts of the document exempted by 22 NYCRR 202.8-b(b).