

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,

Index No. 902866-24

-against-

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

Defendants.

**DEC REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The Green Amendment protects an individual's right to "clean air and water, and to a healthful environment" (NY Const art I, § 19). That important individual right has no application, however, against defendant Department of Environmental Conservation (DEC) in this lawsuit. The Appellate Division, Fourth Department recently reversed a trial court on an almost identical Green Amendment challenge. In *Fresh Air for the Eastside, Inc. v State of New York* (*Fresh Air*), the plaintiff claimed that the Green Amendment required DEC to take additional enforcement actions against a privately owned and operated landfill (__ AD3d __, __, 2024 NY Slip Op 03950 at *1-2 [4th Dept 2024]). The Court recognized that the *Fresh Air* plaintiff's requests for declarations and injunctions based on DEC's alleged lack of enforcement against that landfill was, in essence, a request for mandamus to compel DEC enforcement action (*id.* at *2). It concluded that the Green Amendment did not alter the rule that courts cannot compel executive acts that require the agency's judgment or discretion, such as enforcement proceedings (*id.*). As a result, the Court held that the *Fresh Air* plaintiff failed to state a cause of action, overturning the portion of the trial court order allowing the lawsuit to proceed against DEC (*id.*).

So too here. The Fourth Department is the first appellate court to decide whether the Green Amendment provides an individual right to

compel government action against a third party. Plaintiffs' contention in this lawsuit—that the Green Amendment allows courts to override DEC's discretionary enforcement and regulatory determinations—has been decisively rejected in precedent binding on this Court. Plaintiffs have failed to state a claim.

And because *Fresh Air* makes clear that none of plaintiffs' Green Amendment allegations state a cause of action, this Court need not reach Seneca Meadows' alternative argument that the amendment is not self-executing. *Stare decisis* requires that courts avoid deciding constitutional issues that are unnecessary for the disposition of a case, and plaintiffs' Green Amendment claims can be dismissed without resort to this academic issue.

ARGUMENT

POINT I

PLAINTIFFS LACK A COGNIZABLE GREEN AMENDMENT CLAIM

In its opening brief, DEC argued that the Green Amendment did not alter long-standing separation of power principles that prevent courts from interfering with DEC's exercise of its discretionary enforcement and

regulatory authority over landfills.¹ (See [DEC MOL](#) at 7-23). DEC took the same position before the Fourth Department in the then-pending *Fresh Air* appeal. (See generally NYSCEF dock. no. [23-00179](#), doc. nos. [37](#) [State Defendants' Opening Br.], [65](#) [State Defendants' Reply Br.]). In that case, as here, the *Fresh Air* plaintiff sought injunctive and declaratory relief against DEC on the allegation that “odors . . . from [a] landfill violated” individual rights under the Green Amendment (*Fresh Air*, 024 NY Slip Op 02345 at *1).

The Fourth Department has since decided *Fresh Air* and reaffirmed that, “notwithstanding the Green Amendment,” courts can use neither declarations nor injunctions to direct an agency’s use of its discretionary enforcement authority (*id.* at *1-2). More specifically, the Court recognized that the *Fresh Air* plaintiff’s “ostensible” request for a declaratory judgment about DEC’s alleged enforcement failures was actually a request for the judiciary “to compel” DEC “to take enforcement action against a private entity” (*id.* at *2). It explained that “an administrative agency’s enforcement decisions are ‘generally unsuitable for judicial review’ because ‘an agency

¹ DEC also made a separate argument that, setting aside plaintiffs’ failure to state any cognizable Green Amendment cause of action, the corporate plaintiffs lack standing to raise a Green Amendment claim. (See [DEC MOL](#) at 23-25). Plaintiffs’ response does not address this standing issue.

decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise” (*id.*, quoting *Heckler v Chaney*, 470 US 821, 831 [1985] [internal brackets omitted]). As a result, the Court held that the *Fresh Air* plaintiff’s request to compel enforcement action was improper, because DEC’s regulatory enforcement authority involved the exercise of “judgement or discretion” (*id.*). Concluding that the *Fresh Air* plaintiff failed to state any cognizable Green Amendment cause of action, the Fourth Department dismissed the complaint in its entirety (*see id.*).

The *Fresh Air* holding is binding precedent that requires dismissal of the lawsuit against DEC. Because neither the Third Department nor the Court of Appeals has issued precedent on the scope of the Green Amendment, this Court is “bound by the doctrine of stare decisis to apply precedent established in [the Fourth] Department” (*Shoback v Broome Obstetrics & Gynecology, P.C.*, 184 AD3d 1000, 1001 [3d Dept 2020] [quotation marks and citation omitted]; *see Phelps v Phelps*, 128 AD3d 1545, 1547 [4th Dept 2015] [same rule for Fourth Department]; *D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014] [same rule for First Department]; *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept. 1984] [same rule for Second Department]).

A. Plaintiffs' Challenge to DEC's Enforcement Discretion Fails to State a Green Amendment Claim.

Fresh Air is directly on point. It holds that a plaintiff fails to state a Green Amendment cause of action for declarations and injunctions based on DEC's alleged failure to enforce against a landfill for odors. As in that case, plaintiffs' complaint here alleges that DEC violated the Green Amendment by failing "to bring enforcement against" Seneca Meadows for alleged landfill odors. ([Complaint](#) ¶¶ 68, 99-100, 103). And plaintiffs' response to the motions to dismiss press the same arguments made by the *Fresh Air* plaintiff that were rejected by the Fourth Department.²

Most notably, the Fourth Department has rejected plaintiffs' assertion that it is "irrelevant" to a Green Amendment inquiry that a court cannot compel DEC to take enforcement action against a landfill. ([Plaintiffs' MOL](#) at 10). It is, instead, dispositive. This is because while plaintiffs "ostensibly" seek declarations and injunctions to remedy DEC's alleged enforcement shortcomings, those claims "essentially" sound in CPLR article 78 mandamus

² Plaintiffs' specific argument that DEC violates the Green Amendment by "allowing the [l]andfill to operate" ([Plaintiffs' MOL](#) at 9) is indistinguishable from the *Fresh Air* plaintiff's argument that DEC violated the Green Amendment by "acquiesc[ing] to the continued operation" of the challenged landfill (NYSCEF Dock. No. 23-00179, Doc. No. [45](#) [*Fresh Air* Plaintiff's Br.] at 35).

“seeking to compel the State to take enforcement action against a private entity” (*Fresh Air*, 024 NY Slip Op 02345 at *2). Under well-settled law, courts “cannot ‘impose mandamus relief to compel an act in respect to which the [administrative agency] may exercise judgment or discretion’” (*id.*, quoting *Klostermann v Cuomo*, 61 NY2d 525, 539 [1984] [internal quotation marks omitted]). Because DEC enforcement decisions require judgment and discretion, plaintiffs’ complaint fails to state a Green Amendment cause of action (see *id.* at 1-2).

The same result flows from plaintiffs’ attempt to enjoin DEC from continuing its ongoing application review for a proposed landfill expansion. Plaintiffs argue that they need not wait for a DEC determination on the pending permit modification applications because the Court can enjoin DEC now so that no modified permits are ever granted. (See *Plaintiffs’ MOL* at 6). That request is no different than one for mandamus to compel DEC to deny the requested modifications (see *id.* at 1-2 [analyzing the essential nature of the relief requested rather than the lawsuit’s ostensible label]). Such relief is inappropriate, first, because mandamus “is never granted for the purpose of compelling the performance of an unlawful act,” and here plaintiffs seek to compel DEC to violate its statutory duties to review Seneca Meadows’ applications and conduct required State Environmental Quality Review Act

(SEQRA) analysis (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388 [2006]; *see generally* ECL Article 8 [statutory SEQRA obligations]; ECL Article 70 [statutory application-review obligations]). Even absent this improper request to compel DEC to violate its procedural obligations, DEC's substantive SEQRA and permit-application determinations cannot be compelled because both require "judgment [and] discretion" (*Fresh Air*, 024 NY Slip Op 02345 at *2; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 421 [1986] [courts provide deference to substantive SEQRA determinations]; *Matter of Riverkeeper, Inc. v New York State Dept. of Env'tl. Conservation*, 152 AD3d 1016, 1019 [3d Dept 2017] [courts provide deference to substantive permitting determinations]). Plaintiffs' request for a judicially-compelled denial of the pending applications thus fails to state a cause of action (*see Fresh Air*, 024 NY Slip Op 02345 at *2).

B. Plaintiffs Challenge no DEC Action to which the Green Amendment Could Apply.

The only question that remains is whether plaintiffs challenge a DEC *action* that could be the proper subject of judicial review under the Green Amendment. Because they do not, the complaint against DEC should be dismissed.

1. DEC Does Not Operate Landfills.

DEC regulates landfills; it does not operate them. So plaintiffs' claim that DEC is responsible for landfill odors because it "participat[es]" in the "operation of the [l]andfill" (Plaintiffs' MOL at 1) cannot survive a motion to dismiss (see *Godfrey v Spano*, 13 NY3d 358, 373 [2009] ["conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss"]; see also *Pierce v Archer Daniels Midland, Co.*, 221 AD3d 1382, 1383 [3d Dept 2023] [allegations that are "inherently incredible" do not survive a motion to dismiss] [internal quotations marks and citations omitted]). The Fourth Department rejected the *Fresh Air* plaintiff's similar assertion that it could proceed on the allegation that it was "difficult to discern" whether the private landfill owner or the State "control[led] the operations" of the challenged landfill (NYSCEF Dock. No. 23-00179, Doc. No. 45 [*Fresh Air* Plaintiff's Br.] at 40), and the same result is warranted here (see *Fresh Air*, 024 NY Slip Op 02345 at *2-3).

2. The Green Amendment Cannot be Used to Retroactively Challenge DEC Permits.

In response to DEC's motion, plaintiffs inaccurately claim that their complaint alleges that DEC violated the Green Amendment by "permitting" the facility. (Plaintiffs' MOL at 9). The complaint only alleges, however, that

DEC violated the Green Amendment by failing “to bring enforcement against” Seneca Meadows and by continuing to review Seneca Meadows’ application for a permit modification. (See [complaint ¶¶ 68, 94-107](#)). The complaint neither alleges that the issuances of the permits were improper nor requests that the permits be annulled. (See [complaint](#) at 19). Because it was never pleaded, plaintiffs’ new challenge to Seneca Meadows’ operating permits is unpreserved as a defense against dismissal.

In any event, even if preserved, the challenge to Seneca Meadows’ current operating permits is devoid of merit for at least two independent reasons. First, plaintiffs’ attempt to retroactively apply the Green Amendment states no cause of action. DEC issued Seneca Meadows’ operating permits before the Green Amendment took effect in 2022. (See Haley aff exhs [A](#) at 1 [solid waste permit issued in 2017], [B](#) at 1 [Title V air permit issued in 2021]). Plaintiffs’ challenge thus fails because “[c]onstitutional provisions are to be construed as prospective only, unless a clear expression of intent to the contrary is found” ([Matter of Ayman v Teachers' Retirement Bd. of City of N.Y.](#), 9 NY2d 119, 125 [1961]), and nothing in the text or history of the Green Amendment suggests it has retroactive application.

Moreover, the challenge is also untimely. A constitutional challenge to a permitting determination can be resolved in a CPLR article 78 proceeding, and, as a result, a four month statute of limitations applies (see *Walton v New York State Dept. of Correctional Servs.* 8 NY3d 186, 194 [2007] [constitutional challenges to an administrative determination subject to four month statute of limitation]). Plaintiffs' challenge is time barred because neither of Seneca Meadows' operating permits were issued in the four months prior to the commencement of this litigation (see e.g. *Via Health Home Care, Inc. v New York State Dep't of Health*, 33 AD3d 1100, 1102 [3d Dept. 2006]). (See Haley aff exhs A at 1, B at 1).

3. The Green Amendment Cannot be Used to Challenge DEC's Ongoing Permit Application Review Process.

Finally, any challenge to DEC's ongoing application review is not ripe for adjudication. Plaintiffs' respond that their challenge is ripe because (1) the Court can issue a declaratory judgment and (2) no future decision could prevent or ameliorate the harms from current odors stemming from DEC's alleged lack of enforcement (Plaintiffs' MOL at 6). But this merely restates the non-enforcement challenge that was rejected in *Fresh Air*.

In any event, courts cannot issue declaratory judgments on matters that are unripe for judicial review (*Church of St. Paul & St. Andrew v*

Barwick, 67 NY2d 510, 518 [1986] [“It is basic that a court should decline to apply the discretionary relief of declaratory judgment . . . unless” there is a “controversy ripe for judicial resolution.”] [internal quotation marks and citation omitted]). And just this year, the Third Department held that a constitutional challenge to an ongoing SEQRA review—that is, the type of challenge plaintiffs bring here—was unripe for judicial review (*Matter of Vaughan v New York State Dept. of Transp.*, 223 AD3d 1010, 1012 [3d Dept 2024]).

Moreover, the claim that the request to enjoin a landfill expansion is ripe because of *current* landfill odors is, at best, a *non sequitur*. Plaintiffs’ application-review challenge seeks to prevent odors that plaintiffs predict will result from *future*, expanded landfill activities. But if administrative review ultimately proves that Seneca Meadows is not entitled to the modifications, no expansion will be authorized. So plaintiffs’ speculative predictions about future harms from new landfill activities “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]). The challenge is unripe as a result.

POINT II

THE COURT NEED NOT DECIDE WHETHER THE GREEN AMENDMENT IS
SELF-EXECUTING

Because plaintiffs have failed to state a cause of action under the Green Amendment, the Court should not decide Seneca Meadows' alternative argument that the Green Amendment is not self-executing.³ Courts must "refrain" from addressing constitutional issues that are unnecessary to the disposition of a case (*Matter of Clara C. v William L.*, 96 NY2d 244, 250 [2001]; see *Matter of Medicon Diagnostic Labs. v Perales*, 145 AD2d 167, 170 [3d Dept 1989] ["constitutional issues should be avoided whenever possible"]), *affd* 74 NY2d 539, 549 [1989]). And even where, as here, a court must pass on *some* constitutional issues, issues should not be decided in "broader terms than are required by the precise facts to which the ruling is to be applied" (*Matter of Peters v New York City Hous. Auth.*, 307 NY 519, 527 [1954]).

This Court can dismiss the Green Amendment claims without considering self-execution. The determinative issues for plaintiffs' Green Amendment claims are narrow: can plaintiffs use the Green Amendment to compel DEC enforcement action against a landfill or to challenge DEC's

³ Plaintiffs' response inaccurately asserts that DEC argued that the Green Amendment is not self-executing. (See [Plaintiffs' MOL](#) at 6). DEC did not.

ongoing review of permit modification applications *before* DEC has made any decisions that impact plaintiffs? The answer to both questions is “no.”

“[N]otwithstanding the Green Amendment,” courts will not interfere in administrative agency actions that involve the “exercise [of] judgement or discretion” (*Fresh Air*, 024 NY Slip Op 02345 at *1-3, quoting *Klostermann v Cuomo*, 61 NY2d at 539 [internal quotation marks omitted]). Plaintiffs’ Green Amendment claims fail because each would require improper interference with DEC’s regulatory discretion. No further determination is necessary before dismissing the Green Amendment causes of action.

CONCLUSION

The Court should dismiss the action against DEC.

Dated: August 2, 2024
Albany, New York

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