STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK
and the NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Plaintiffs, Cross-Defendants,

-and-

GREEN EDUCATION AND LEGAL FUND,
LIGHTS OUT NORLITE, BRADFORD BLAUHUT,
DEBORAH LINDLEY, MARK BELOKOPITSKY,
and KAREN ROBINSON,

Plaintiffs, Cross-Plaintiffs,

-against-

NORLITE, LLC,

Defendant.

DECISION AND ORDER
Index No.: 907689-22

(Supreme Court, Albany County, All Purpose Term)
(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: HON. LETITIA JAMES
Attorney General of the State of New York
Attorney for Plaintiffs/Cross-Defendants
(Morgan A. Costello, Esq., Assistant
Attorney General, of Counsel)
Environmental Protection Bureau
The Capitol
Albany, New York 12224

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.
Attorneys for Plaintiffs/Cross-Plaintiffs
(Todd D. Ommen, Esq., of Counsel)
79 North Broadway
White Plains, New York 10603

O'CONNOR, J.:

Background

Plaintiffs/cross-defendants the People of the State of New York and the New York State Department of Environmental Conservation ("DEC") (collectively "State") move for leave to renew their motion to dismiss the third cause of action of plaintiffs/cross-plaintiffs Lights Out Norlite, Green Education and Legal Fund, Bradford Blauhut, Deborah Lindley, Mark Belokopitsky, and Karen Robinson ("LON"), wherein the State sought dismissal for failure to state a cause of action, and obtain dismissal of LON's third cause of action against the State on this basis, in light of the Fourth Department's recent decision in *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217, 1219 [4th Dep't 2024], issued on July 26, 2024 ("*Fresh Air*"). The Court's Decision and Order (O'Connor, J.), dated March 6, 2024, denied DEC's motion to dismiss LON's third cause of action. The facts alleged within the Court's Decision and Order (O'Connor, J.) are incorporated by reference.

In *Fresh Air*, plaintiff Fresh Air for the Eastside, Inc. commenced an action against New York State, DEC (collectively "State defendants"), Waste Management of New York, LLC ("WM"), and the City of New York seeking declaratory and injunctive relief. Fresh Air for the Eastside Inc., "a non-profit corporation comprised of over 200 members who reside within four miles of the landfill, was formed to address odors and fugitive emissions resulting from WM's allegedly inadequate operation of the landfill" (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1217). Within plaintiff's single cause of action, it alleged that "[t]he continuing emissions of Odors and Fugitive Emissions by the Landfill violate the constitutionally protected, affirmative rights of the Members to 'clean air…and a healthful environment' " (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). The complaint further alleged that "[t]he State has failed to adequately use its enforcement powers to cause [WM]

to control the Odors and Fugitive Emissions at the Landfill" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). Due to this alleged constitutional violation, the complaint sought, among other things, a Court order:

> (1) [D]eclar[ing] [that] Defendants are violating Plaintiff's constitutional rights under the Green Amendment in Article I §19 of the New York State Constitution to clear air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact on climate change; and
> (2) [O]rdering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community
>
> *Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 30.

As is relevant here, the State defendants moved to dismiss the complaint against them on the grounds that, "notwithstanding the Green Amendment, mandamus relief is not available to compel" the State defendants to take enforcement actions against WM (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1218). The Supreme Court denied the State defendants' motion to dismiss. The Fourth Department reversed and granted the State defendants' motion, dismissing the complaint in its entirety, finding that "[i]nasmuch as the court cannot impose mandamus relief to compel an act in respect to which the administrative agency may exercise judgment or discretion, such as an enforcement proceeding, the complaint fails to state a cause of action against State defendants" (*id.* at 1220 [internal quotation marks, brackets and citations omitted]). The Fourth Department stated that while the complaint "ostensibly seeks declaratory relief, it is essentially a CPLR [A]rticle 78 proceeding in the nature of mandamus, seeking to compel the State to take enforcement action against a private entity" (*id.* at 1219 [internal quotation marks and citations omitted]). In *Fresh Air*, the Fourth Department noted the following:

> [U]nless the administrative agency has " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory

> responsibilities" (*Heckler*, 470 U.S. at 833 n 4, 105 S.Ct. 1649), the responsibility for balancing those factors is " 'lodged in a network of executive officials, administrative agencies and local legislative bodies,' " and private parties—however well-intentioned—may not "interpose themselves and the courts" between the agencies and the difficult policy determinations they must make regarding whether and when to take regulatory action ([citation omitted]; *Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d 1217, 1219 [4th Dep't 2024]).

Discussion

I. Contentions

In support of its motion to renew, the State argues that because neither the Court of Appeals nor the Third Department has issued a decision addressing the scope of the Green Amendment, *Fresh Air* is binding precedent in this case requiring dismissal of LON's cause of action against DEC (*citing Shoback v. Broome Obstetrics and Gynecology, P.C.*, 184 A.D.3d 1000, 1001 [3d Dep't 2020]). According to the State, *Fresh Air* held that the Green Amendment (NY Const., art I, §19) does not create a cause of action to compel enforcement action by DEC, "because DEC's regulatory enforcement authority involved the exercise of 'judgment or discretion' " (NYSCEF Doc. No. 356 at 6, quoting *Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1220). The State argues that in the *Fresh Air* Complaint, the only State conduct alleged to have violated the Green Amendment was "DEC's regulatory failure to take enforcement action against a private party based on inadequate operation of business" (NYSCEF Doc. No. 356 at 5). The State maintains that in both cases plaintiffs seek both declaratory and injunctive relief. The State notes that the Fourth Department "rejected any distinction between a declaration that the State acted unconstitutionally and an injunction to direct DEC enforcement" (NYSCEF Doc. No. 356 at 6), citing the portion of the *Fresh Air* decision which states that "although the complaint ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus, seeking to compel the State to take enforcement action against a private entity" (*Fresh Air for the*

Eastside, Inc. v. State, 229 A.D.3d at 1219 [internal quotation marks and citations omitted]). The State maintains that because LON asserted this same cause of action in their complaint, in light of *Fresh Air*, the Court's March 6, 2024, Decision and Order (O'Connor, J.) denying DEC's motion to dismiss must be reversed.

LON opposes the State's motion, alleging that *Fresh Air*, while a binding legal authority, is distinguishable from the present action which has differing allegations and relevant facts. LON states that the Fourth's Department's dismissal in *Fresh Air* was based upon a finding that there was "no clear law to apply…in determining the obligations of the State" and "the remedy of mandamus was not available to compel general, unrestrained, discretionary enforcement action" (NYSCEF Doc. No. 362 at 4). LON argues that neither of these conclusions can be found in the present action as "there is both clear law to apply and clear regulatory action that is not mere general discretionary enforcement" (NYSCEF Doc. No. 362 at 4). LON also argues that the cases are factually distinguishable because DEC only issued one violation to the landfill in *Fresh Air*, while it has issued "numerous violations" to Norlite (NYSCEF Doc. No. 362 at 6). LON maintains that because "no action or penalty imposed has stopped" Norlite's "negligent and hazardous operation[s]…[t]he only remedy is for an order enjoining" Norlite's operations (NYSCEF Doc. No. 362 at 6).

Turning first to the applicable law, LON states that Norlite's operations under their hazardous waste permit are governed by New York Environmental Conservation Law ("ECL") Chapter 43-B, Article 27, Title 9, Section 27-0913, which states that "[t]he commissioner shall assure that permits authorizing hazardous waste treatment, storage, disposal or transportation are not issued to nor held by unqualified or unsuitable persons." (ECL § 27-0913[3]). LON alleges that DEC's Order on Consent Enforcement Policy; Record of Compliance; Natural Resource Damages and Small Business Self-Disclosure Policy ("DEE-16") is also called in question by

Norlite's continued permit violations and statutory violations. NYSCEF DEE-16 states that "[u]nder current law, Persistent or significant violators of the Environmental Conservation Law should not have permits renewed or be allowed to obtain new permits after committing breaches of law directly relating to their ability to carry out the authorized activities in a lawful and environmentally responsible manner" (NYSCEF DEE-16). LON notes what while an administrative agency's enforcement decisions are generally unsuitable for judicial review, the United States Supreme Court noted in *Heckler v. Chaney*, 470 U.S. 821, 831 [1985], that where there is "law to apply," an action may be reviewable "where the substantive statute has provided guidelines for the agency to following in exercising its enforcement powers" (*id.* at 832-833).

LON then states that DEC is under an enforceable duty enjoined by law "to protect the public from unfit permittees" (NYSCEF Doc. No. 362 at 7), by not permitting "operations by those who are 'unqualified or unsuitable' and/or those who lack the 'ability to carry out the authorized activities in a lawful and environmentally responsible manner' " (NYSCEF Doc. No. 362 at 8, quoting ECL § 27-0913[3]). On this basis, LON maintains that the application of ECL § 27-0913(3) and DEE-16 "create a clear legal obligation for DEC to take action on Norlite's permit" (NYSCEF Doc. No. 362 at 8). LON emphasizes that the language within DEE-16 Title VI. Specific Responsibilities makes clear that where appropriate, "[r]egional attorneys and other OGC attorneys…*shall* initiate and conduct administrative proceedings to deny, revoke, modify, condition or suspend permits or initiate enforcement proceedings" (NYSDEC DEE-16 [emphasis added]). LON argues that the language in both ECL and DEE-16 "impute[] a clear legal obligation to perform…action on Norlite's permit" (NYSCEF Doc. No. 362 at 9).

In reply, the State argues that despite LON's attempt to distinguish this action from *Fresh Air*, the two cases are "factually comparable" and request the same form of injunctive and declaratory relief (NYSCEF Doc. No. 365 at 5). The State maintains that in LON's complaint, it

alleges that DEC's "ongoing permitting" of Norlite's facility is in violation of the Green Amendment (quoting NYSCEF Doc. No. 123 at 8). Similarly, in *Fresh Air*, plaintiff "rooted its Green Amendment claim in the 'continued permitting' of defendant's landfill" (NYSCEF Doc. No. 365 at 7, quoting *Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699). The State highlights that the only distinction between the type of injunctive relief requested is that plaintiff in *Fresh Air* sought either "immediate proper closure" of the landfill (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699), which the State argues would necessarily require DEC to rescind the Landfill's permit, or "immediate[] abatement" of the alleged emissions (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699). Considering this, the State maintains that even if DEC's permitting authority differed from its general enforcement authority, it is irrelevant because both complaints at issue sought to rescind permits. The State notes that while the language in *Fresh Air* referred to "enforcement proceedings" its holding was not limited to those regulatory actions, as the Fourth Department found mandamus to compel improper in discretionary determinations "such as an enforcement proceeding" (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1219). Moreover, the State rejects LON's representation that the cases are distinguishable due to the number of violations DEC issued to Norlite. The State argues that it is irrelevant what enforcement actions were already taken as the Fourth Department "solely considered whether the agency action sought to be compelled fell within that agency's discretion" (NYSCEF Doc. No. 365 at 8).

Next, the State rejects LON's representation that *Fresh Air* distinguished between general enforcement action and specific action on permits. The State argues that LON misapplies *Fresh Air*, which "reaffirmed a longstanding principle…that mandamus 'does not lie to compel an act which involves an exercise of judgment or discretion' " (NYSCEF Doc. No. 365 at 5-6, quoting

Fresh Air for the Eastside, Inc. v. State, 229 A.D.3d at 1219 [further citations omitted]). The State notes that the only distinction made by the Fourth Department was that "DEC could only be compelled to perform a 'ministerial' duty" (NYSCEF Doc. No. 365 at 6, quoting *Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1219).

Turning to LON's purported exception to DEC's general discretionary authority, the State argues that LON misconstrues the law set forth in *Heckler v. Chaney*, 470 U.S. 821 [1985], which provides that there is only "law to apply" warranting mandamus where Congress "indicated an intent to circumscribe agency enforcement discretion" and "provided meaningful standards for defining the limits of that discretion" (NYSCEF Doc. No. 365 at 8-9, quoting *Heckler v. Chaney*, 470 U.S. at 834-835). The State contends that parties who seek this same relief under New York law must demonstrate " 'a clear legal right' based upon the 'nature of the duty sought to be commanded' " (NYSCEF Doc. No. 365 at 9, quoting *Matter of Brusco v. Braun*, 84 N.Y.2d 674 679 [1994]). In light of this caselaw, the State argues that the relevant question is "not whether there is law to apply but whether that law has adequately constrained agency discretion" (NYSCEF Doc. No. 365 at 9). Looking to ECL § 27-0913(a), the State argues that in its entirety the statue provides:

> The commissioner shall assure that permits authorizing hazardous waste treatment, storage, disposal or transportation are not issued to nor held by unqualified or unsuitable persons. To effectuate this purpose, and in addition to any other available grounds, **the commissioner may**, consistent with the policies of article twenty-three-A of the correction law and the provisions of section 70-0115 of this chapter, deny, suspend, revoke or modify any permit, renewal or modification thereto for the treatment, storage, disposal or transportation of hazardous waste, after determining in writing that such action is required to protect the public health and safety (ECL § 27-0913 [3] [emphasis added]).

Considering this language, the State maintains that ECL §27-0913(3) gives DEC discretion to determine what action to take. Moreover, contrary to LON's assertions, the State argues that

DEE-16 explicitly states that its policies and procedures are "intended solely for the use and guidance of DEC personnel" and "are not intended to create any substantive or procedural rights, enforceable by any party in administrative and judicial litigation within the State of New York" (NYSCEF Doc. No. 365 at 10, quoting DEE 16 ¶ 1). The State points out that DEE-16 expressly "reserves the right to act at variance with these policies and procedures" (NYSCEF Doc. No. 365 at 10, quoting DEE 16 ¶ 1). The State then argues that the following language indicates that the policies and guidelines are subject to DEC's discretion (NYSCEF Doc. No. 365 at 11):

> If a permit is issued to a prior violator, it **may be appropriate** to impose strict reporting or monitoring conditions....There is, thus, a need for guidance for **case by case application** of the principles embodied in the Environmental Conservation Law" (DEE-16 ¶ 11: Factual Background [emphasis added]).

The State notes that DEE-16 has not been administratively interpreted as "substantive law to apply" as LON contends (citing *Matter of CWM Chemical Services*, LLC [DEC Permit Application Nos. 9-2934-00022/00225, 9-2934-00022/00231, 9-2934-00022/00233, 9-2934-00022/00232, 9-2934-00022/00249], 2015 WL 9581260, *68 [December 22, 2015]; *Matter of Jeffrey Ash*, DEC Case No. OHMS 2013-68434, 2014 WL 2047906, *13 [March 5, 2014]; *Matter of Kings Park Energy, LLC*, DEC Application No. 1-4734-00333/00003, 2002 WL 31153614, *1 [September 12, 2002]). Considering the foregoing, the State maintains that neither ECL §27-0913(3) nor DEE-16 mandates a ministerial act, only an "exercise of judgment of discretion" (NYSCEF Doc. No. 365 at 11-12, quoting *Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1219). For these reasons, the State argues that LON's third cause of action must be dismissed.

II. Standard of Review

To succeed on a motion to renew, the moving party must submit "new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). Additionally,

the motion must "contain reasonable justification for the failure to present such facts on the prior motion" (*Iannotti v. Two Plus Four Mgt. Co.*, 209 A.D.3d 1248, 1249 [3d Dep't 2022], quoting CPLR 2221 [e]). "A clarification of the decisional law is a sufficient change in the law to support renewal" (*Deutsche Bank Natl. Tr. Co. v. Cincu*, 228 A.D.3d 825, 827 [2d Dep't 2024] [internal quotation marks and citations omitted]; *see Pryce v. Nationstar Mtge., LLC*, 224 A.D.3d 857, 858 [2d Dep't 2024]).

III. Relevant Law

"An administrative action is 'committed to agency discretion' where the governing law is 'drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion' " (*Vela-Estrada v. Lynch*, 817 F.3d 69, 71 [2d Cir 2016], quoting *Heckler v. Chaney*, 470 U.S. at 830; *see Nat. Resources Defense Council, Inc. v. U.S. Food and Drug Admin.*, 760 F.3d 151, 171 [2d Cir 2014]). The United States Supreme Court has held that where Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under [5 USCA] § 701(a)(2), and courts may require that the agency follow that law" (*Heckler v. Chaney*, 470 U.S. at 834-35; *see Lunney v. United States*, 319 F.3d 550, 558 [2d Cir 2003]). In the absence of this "narrow" exception, the Court should "leave to Congress…the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable" (*Heckler v. Chaney*, 470 U.S. at 838).

In the context of an Article 78 proceeding, to obtain a writ of mandamus compelling agency action, petitioner must demonstrate "a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Mental Hygiene Legal Serv. v Delaney*, 38 N.Y.3d 1076, 1095-96 [2022] [internal quotation marks and citations omitted]; *see Waite v. Town of Champion*, 31 N.Y.3d 586, 593 [2018]). As

such, "[a] writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are ministerial and mandatory, not discretionary" (*Cafferty v. Mihalko*, 182 A.D.3d 848, 850 [3d Dep't 2020]; *Matter of Curry v. New York State Educ. Dept.*, 163 A.D.3d 1327, 1330 [3d Dep't 2018]). "Discretionary acts involve the exercise of judgment that may produce different and acceptable results" (*Matter of Hoffmann v. New York State Ind. Redistricting Commn.*, 217 A.D.3d 53, 61 [3d Dep't 2023] [citations omitted], *affd* 41 N.Y.3d 341 [2023]). In contrast, "where the law prescribes the rule to be followed so as to leave nothing to the exercise of judgment or discretion, the act is a ministerial act" (*Matter of Long v. Town of Caroga*, 219 A.D.3d 1075, 1077-1078 [3d Dep't 2023]).

The purpose of Environmental Conservation Law Title 9 is "to regulate the management of hazardous waste" in New York State (ECL § 27-0900). Pursuant to ECL § 27-0913(1)(a), "[n]o person shall engage in storage, treatment, or disposal, including storage at the site of generation, of hazardous wastes without first having obtained a permit." The statute further provides that "[t]he commissioner shall assure that permits authorizing hazardous waste treatment, storage, disposal or transportation are not issued to nor held by unqualified or unsuitable persons" (ECL § 27-0913[3]).

> [T]o effectuate this purpose, and in addition to any other available grounds, **the commissioner may**, consistent with the policies of article twenty-three-A of the correction law and the provisions of section 70-0115 of this chapter, deny, suspend, revoke or modify any permit, renewal or modification thereto for the treatment, storage, disposal or transportation of hazardous waste, after determining in writing that such action is required to protect the public health and safety (ECL § 27-0913[3] [emphasis added]).

The statute then lists "**[s]ome** of the factors which the commissioner **may** consider at arriving at his determination (ECL § 27-0913[3][a]-[f] [emphasis added]). "While the Commissioner's interpretation of DEC's regulations is generally entitled to deference if it is not irrational or unreasonable,…where…the issue is 'one of pure statutory reading and analysis, dependent only

on accurate apprehension of legislative intent,' no deference is accorded" (*Matter of Thompson Corners, LLC v New York State Dept. of Envtl. Conservation*, 119 A.D.3d 81, 87 [3d Dept 2014], *lv denied* 24 N.Y.3d 910 [2014], quoting *Matter of New York State Superfund Coalition, Inc. v. New York State Dept. of Envtl. Conservation*, 18 N.Y.3d 289, 296 [2011] [further citations omitted]).

DEE-16 clarifies that at its outset that "[t]he policies and procedures set out in this document are intended solely for the use and guidance of DEC personnel" and "are not intended to create any substantive or procedural rights, enforceable by any party in administrative of judicial litigation within the State of New York." DEE-16 states further that "DEC reserves the right to act at variance with these policies and procedures." Section II, entitled "Factual Background" provides:

> On several occasions issues have arisen regarding whether [DEC] should issue permits…to persons who have acted in violation with the laws of New York State. Uniform guidance on the use of compliance histories pursuant to which permits are denied, suspended, conditioned or revoked is critical to attaining the objective of environmental protection. Under current law, [p]ersistent or significant violators of the Environmental Conservation Law should not have permits renewed or be allowed to obtain new permits after committing breaches of law directly relating to their ability to carry out the authorized activities in a lawful and environmentally responsible manner…There is, thus, a need for guidelines for **case by case application** of the principles embodied in the Environmental Conservation Law and its enforcement statewide (DEE-16 [emphasis added]).

Thereafter, within Section III, entitled "Legal Background," DEE-16 acknowledges the Commissioner's "authority to issue permits and licenses by the Legislature for the protection and management of the environment of New York State" and notes that "[i]nherent in this authority is the **discretion** to deny permits" (DEE-16 [emphasis added]). DEE-16 then states that:

> The legislative requirement that a person have a permit or license in order to engage in certain activities creates not only an authorization but a command to the permitting and licensing authority to take **reasonable steps** to ensure that the applicant is a fit and proper person to engage in the permitted or licensed activity (DEE-16 [emphasis added]).

Within DEE-16 Section IV, entitled "Enforcement Principles and Goals," the document provides that:

> To attain the goals set forth herein, **on a case by case basis the Department may**…[u]ndertake civil or administrative enforcement and/or permit proceedings, seeking suspension, modification or revocation of permits…[;] [u]ndertake a background review of all appropriate applications for permits, and renewals thereof, by utilizing enforcement data collected by Division of Law Enforcement (DLE), Division of Environmental Enforcement (DEE) and from Regional and Central office programs…[;] [or] [a]mend appropriate permit application and renewal forms to include a record of compliance section (DEE-16 [emphasis added]).

DEE-16 then lists a number of **factors** which "**should be considered a basis for exercising the Department's discretion** in denying, suspending, modifying or revoking a permit."

IV. Analysis

Upon the Court's review of the Fourth's Department decision in *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217, 1219 [4th Dep't 2024], issued on July 26, 2024, the Court finds that the Fourth Department's holding is a clarification of the decisional law which warrants the reversal of this Court determination on March 6, 2024, which denied the State's motion to dismiss LON's third cause of action. As an initial matter, the Court rejects LON's representation that there are distinctions between LON's complaint and plaintiff's complaint in *Fresh Air* that warrant a different outcome in this case.

In *Fresh Air*, plaintiff's single cause of action stated that DEC "has an affirmative duty to all citizens of New York to protect the environment" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). Plaintiff in that case alleged that "[b]y allowing repeated permit and regulatory violations at the Landfill and delaying actions to drastically cut GHG emissions, the State is acting contrary to its mission…[and] breaches the agency's basic duty to care for the Members and their environment" (*Fresh Air for the Eastside,*

Inc. v. State, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28). The complaint alleged that DEC "has authorized and permitted activities that emit vast quantities of GHGs" and argues that "[t]he continuing emissions…by the Landfill violate" the Green Amendment (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 28).

Due to this alleged constitutional violation, the plaintiff in *Fresh Air* requested that the Supreme Court "issue an injunction directing the immediate proper closure of the Landfill" or alternatively, that the Court direct defendants "to immediately abate the Odors and Emissions in the Community" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 30). The plaintiff in *Fresh Air* also requested that the Court "declare [that] the Defendants are violating Plaintiff's constitutional rights under the Green Amendment…by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact of climate change" (*Fresh Air for the Eastside, Inc. v. State*, Sup Ct Monroe County, Index No. E2022000699; Complaint at 30).

As was stated in the *Fresh Air* complaint, LON's third cause of action states that DEC "has an affirmative duty to all the citizens of New York to protect the environment" (NYSCEF Doc. No. 123). LON argues that by allowing Norlite's "repeated permit and regulatory violations" DEC is breaching its "basic duty of care for the Plaintiffs and their environment" (NYSCEF Doc. No. 123). Considering this, LON requests declaratory judgment stating that "DEC's ongoing permitting and allowing the Norlite Facility to operate is unconstitutional and violates Plaintiffs' constitutional rights." Within this third cause of action, LON also requests an injunction enjoining Norlite from operating the facility and directing its immediate closure, and specifically requests an injunction in the complaint's prayer for relief, directing DEC to vacate or rescind Norlite's hazardous waste and air permits and not allow Norlite to resume operations.

Considering both pleadings, the Court finds that both plaintiffs requested declaratory relief, stating that DEC violated the constitutional rights of the respective plaintiffs by allowing a facility to continue its operations. In both complaints it is alleged that DEC's allowance of repeated permit and regulatory violations is in contravention of the constitutional rights set forth in the Green Amendment. The Court finds it insignificant for purposes of this inquiry that Norlite had multiple violations, as opposed to the alleged single violation of the Landfill in *Fresh Air*, as both complaints state that permit and regulatory violations occurred. Thus, the Court finds that the factual allegations alleged within LON's complaint align with those rejected by the Fourth Department. In granting the State's dismissal of plaintiff's third cause of action, the Fourth Department stated that while the complaint "ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus, seeking to compel the State to take enforcement action against a private entity" (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1219 [internal quotation marks and citations omitted]). In light of this distinction, and in accordance with the legal standard required for a writ of mandamus to compel, the Court agrees with the State that to distinguish this case from *Fresh Air*, LON would have to establish that ECL § 27-0913(3) and DEE-16 require DEC to perform a "ministerial act" with respect to its permitting process, so as to "leave nothing to the exercise of judgment or discretion" (*Matter of Long v. Town of Caroga*, 219 A.D.3d 1075, 1077-1078 [3d Dep't 2023]).

The Court finds that LON failed to establish that either ECL § 27-0913(3) or DEE-16 compels the performance of a ministerial act. Contrary to LON's assertions, DEE-16 is not a binding authority to compel DEC's performance, as its policies and procedures are "intended solely for the use and guidance of DEC personnel" and "are not intended to create any substantive or procedural rights, enforceable by any party in administrative and judicial litigation within the State of New York" (DEE 16 ¶ 1). The Court finds that on this basis alone, DEE-16 does not

compel DEC's performance of a ministerial act. DEE-16 also explicitly acknowledges the Commissioner's discretionary authority to deny permits and lists a number of "**factors**" which "**should be considered** a basis for exercising the **Department's discretion** in denying, suspending, modifying or revoking a permit" (emphasis added). This language further supports the State's representations and indicates that DEC is granted with discretionary authority in denying, suspending, modifying or revoking a permit. Similarly, in ECL § 27-0913(3), it is provided that the commissioner **may**…deny, suspend, revoke or modify any permit, renewal or modification…for the treatment, storage, disposal or transportation of hazardous waste (emphasis added). The statute proceeds to list several factors which "the Commissioner **may** consider in arriving at his determination" (ECL § 27-0913[3][a]-[f] [emphasis added]). As was stated by the Fourth Department, "the court cannot impose mandamus relief to compel an act in respect to which the administrative agency may exercise judgment or discretion" (*Fresh Air for the Eastside, Inc. v. State*, 229 A.D.3d at 1220 [internal quotation marks, brackets and citations omitted]). Considering the permissible language of both ECL § 27-0913 and DEE-16, along with the existence of a factor-driven analysis in DEC's denial, suspension, revocation or modification of a permit, the Court finds that it lacks the authority to compel DEC to rescind Norlite's permitting, as DEC's obligations are discretionary in nature. Turning back to LON's request for declaratory relief, its allegation that DEC is acting in violation of the Green Amendment directly challenges DEC's statutory discretion. Accordingly, in light of the Fourth Department's recent decision in *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217, 1219 [4th Dep't 2024], issued on July 26, 2024, the Court grants the State's motion for leave to renew, and reverses the Court's Decision and Order (O'Connor, J.), dated March 6, 2024, which denied the State's motion to dismiss LON's third cause of action. Therefore, the Court grants the State's motion to dismiss LON's third cause of action.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination. Accordingly, it is hereby

ORDERED, that plaintiffs/cross-defendants' motion to renew its motion to dismiss plaintiff/cross-plaintiffs' third cause of action is granted; and it is further

ORDERED, that plaintiffs/cross-defendants' motion to dismiss plaintiffs/cross-plaintiffs' third cause of action is granted for the reasons stated herein; and it is further

ORDERED, that the third cause of action within plaintiffs/cross-plaintiffs' complaint is dismissed.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order.

SO ORDERED.

ENTER.

Dated: December 30, 2024
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Plaintiffs/Cross-Plaintiffs' Complaint, dated June 21, 2023;
2. Plaintiffs/Cross-Defendants' Notice of Partial Motion to Dismiss, dated August 24, 2023; Memorandum of Law in Support of Motion, dated August 24, 2023;

3. Plaintiffs/Cross-Plaintiffs' Memorandum of Law in Opposition, dated September 28, 2023;
4. Plaintiffs/Cross-Defendants Memorandum of Law in Reply, dated October 19, 2023;
5. Decision and Order (O'Connor, J.), dated March 6, 2024;
6. Plaintiffs/Cross-Defendants' Notice of Motion to Renew, dated August 16, 2024; Memorandum of Law in Support of Renewal, dated August 16, 2024;
7. Plaintiffs/Cross-Plaintiffs' Memorandum of Law in Opposition, dated October 4, 2024; *and*
8. Plaintiffs/Cross-Defendants' Reply Memorandum of Law, dated October 24, 2024.