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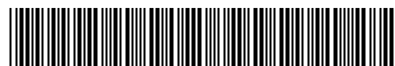

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SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.

Petitioner,

-against-

Index No. E2021008617

TOWN OF PERINTON,
TOWN OF PERINTON ZONING BOARD OF APPEALS, and
WASTE MANAGEMENT OF NEW YORK, L.L.C.,

Respondents.

WASTE MANAGEMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondent Waste Management of New York L.L.C. ("Waste Management") submits this memorandum of law in support of its motion to dismiss pursuant to CPLR § 3211 the Second, Fourth, Fifth, Sixth, and Seventh Causes of Action alleged in the Amended Petition.

In its Second Cause of Action, Petitioner challenges the Town of Perinton Zoning Board of Appeal's ("ZBA") determinations to approve Waste Management's application to renew the Special Use Permit ("SUP") for the High Acres Landfill & Recycling Center established in 1971 ("Landfill") ("SUP Renewal"). Petitioner's allegations that the SUP Renewal was not a Type II action under the State Environmental Quality Review Act ("SEQRA") are contrary to the regulations promulgated by the New York State Department of Environmental Conservation ("NYSDEC"), and are not supported by factual allegations in the Amended Petition. As a matter of law, under the NYSDEC regulations, permit renewals are Type II actions that do not require review under SEQRA. Indeed, NYSDEC itself confirmed that the SUP Renewal that is the subject of this proceeding was in fact a Type II action (*see* Am. Pet. Exhibit C at 3).

In its Fourth Cause of Action, Petitioner alleges that the ZBA violated General Municipal Law § 239-m. In 1994, however, pursuant to General Municipal Law § 239-m (3)(c), the Town and the County of Monroe entered into an intermunicipal agreement under which the parties agreed that permit renewals are local concerns. Based upon this documentary evidence, referral of the Application to Renew the Landfill Permit to the Monroe County under General Municipal Law § 239-m was not required as a matter of law.

Petitioner's Fifth Cause of Action presents a hodgepodge of allegations concerning the Perinton Town Board's approval of a Host Community Agreement ("HCA") with Waste Management. None of that allegations states a valid cause of action. First, there was no improper segmentation of the SEQRA review. As noted, SEQRA review was not required for the SUP

Renewal, much less with the new HCA. Second, though the Amended Petition alleges in conclusory fashion that NYSDEC and the ZBA should have been involved agencies for purposes of a SEQRA review, it provides no factual allegations to support that conclusion. Rather, the Amended Petition itself conclusively shows that neither NYSDEC nor the ZBA had any reason to be involved. Third, the Town Board's Negative Declaration, which is incorporated by reference in the Amended Petition, presents a sufficient written reasoned elaboration of its reasoning for determining that the new HCA had significant benefits and was no less protective of the environment than the previous 2013 HCA, which remained in effect until the new HCA was approved. As a matter of law, therefore, even accepting Petitioner's factual allegations as true, the Fifth Cause of Action fails to state a claim.

Petitioner presents a host of vague constitutional claims in its Sixth Cause of Action, none of which states a cause of action. Most of these constitutional claims appear to be based upon Petitioner's challenge to the Property Value Protection Program ("PVPP") contained within the HCA. The PVPP provides certain residents located in close proximity to the Landfill with the opportunity to receive compensation if application of a particular formula upon the sale of their homes proves diminished property values. It rationally contains a term that prevents otherwise eligible residents from potentially obtaining duplicative compensation; specifically, it excludes from participation anyone who has sued, or otherwise already been compensated, for alleged property value diminution. If a household has already been paid for property diminution, there is no loss to compensate through the PVPP. If a household has sued for alleged property diminution, the litigation will necessarily resolve such factual questions and provide a mechanism for recovery of compensation if warranted.

Also swept into the Sixth Cause of Action is Petitioner's allegation that the HCA Approval somehow violated the new Environmental Rights Amendment in Article I, Section 19 of the New York State Constitution (the "ERA"). The ERA, however, did not become part of the New York Constitution until January 1, 2022, and as a matter of law it does not apply retroactively to the HCA Approval on December 22, 2021. Accordingly, this aspect of the Sixth Cause of Action fails to state a cause of action.

Finally, Petitioner's Seventh Cause of Action is an improper catch-all claim that fails to state a cause of action and must be dismissed.

STATEMENT OF FACTS

The Amended Petition sets out a great many factual allegations, including a partial (and rather selective) history of permits and environmental reviews of the Landfill (Am. Pet. ¶¶ 31-52). Although Waste Management disputes many of the factual allegations, for purposes of this motion to dismiss, the factual allegations must be accepted as true. The Amended Petition also sets forth a number of legal contentions and legal conclusions, (*e.g.*, Am. Pet. ¶¶ 159-60), which should not be accepted as true. The following recitation simply summarizes a few relevant milestones:

The Landfill has been operating since 1972 (Am. Pet. ¶ 35). Over time, the landfill expanded, and it obtained permits for each expansion (*id.* ¶¶ 37-52). The Landfill operates under permits from NYSDEC and the Town of Perinton (*id.* ¶¶ 37, 41, 44, 49, 51, 52). The Town and Waste Management entered into a host community agreement in 2013 (*id.* ¶ 109). The 2013 HCA between the Town and Waste Management had an initial five-year term, after which it renewed on a month-to-month basis (Am. Pet. ¶¶ 109-10). On July 25, 2016, the Town issued the Landfill a Special Use Permit (the "SUP") (*id.* ¶ 52).

The SUP issued to the Landfill by the Town in 2016 was set to expire on August 22, 2021 (Am. Pet. ¶¶ 52, 84). Waste Management therefore submitted to the Town a renewal application,

which the ZBA approved on August 19, 2021 (the "SUP Renewal") (*id.* ¶¶ 84, 90, 103, 105; Am. Pet. Exhibit E at 462-64). Because it was a permit renewal, the ZBA treated the SUP Renewal as a Type II action under SEQRA (Am. Pet. ¶ 104; Am. Pet. Exhibit E at 462).

By letter dated August 25, 2021, NYSDEC confirmed that the SUP Renewal was a Type II action, and that NYSDEC was not an involved agency:

> "As for your recent request for coordination of lead agency regarding the renewal of WM's Special Use Permit by the Town of Perinton Zoning Board of Appeals ("ZBA"), coordination was inappropriate under the circumstances. The Department could not have been an involved agency because WM did not request a modification of its Part 360 or Title V permit. Accordingly, DEC did not have discretionary permitting jurisdiction with regard to the renewal of the Special Use Permit and without such jurisdiction DEC could not have been an involved or lead agency. Additionally, in terms of the ZBA's action, as you are well aware of, the action that was pending before the ZBA was a renewal and renewals are Type II actions, which means that they are not subject to further review under SEQR."

(Am. Pet. Exhibit C at 3 [citations omitted]).

In 2021, the Town and Waste Management negotiated a new HCA to replace the 2013 HCA, and the Town Board approved the new HCA on December 22, 2021 (Am. Pet. ¶ 126; Am. Pet. Exhibit G). As part of its approval process, the Town Board prepared an Environmental Assessment Form for the HCA (Am. Pet. ¶ 140), considered the possible environmental effects and benefits of the HCA, and issued a Negative Declaration that includes a written explanation of its reasoning:

> "**Reasons Supporting this Determination**: That this renewal of the benefits agreement will provide additional benefits from previous agreements, as well as additional protections, applicable town wide and will prove to be ***no less protective of the environment***. Benefits and safeguards include, but are not limited to, a property value protection program; restrictions on aged waste being accepted at the landfill; annual volume limitation on the amount of waste being delivered by rail from New York City; revenue benefits; the creation

> of a Citizens Advisory Committee; continued environmental monitoring with some of the most restrictive limits placed on a facility of this nature in the State; Operations and Maintenance plan modifications, including air monitoring and information sharing requirements; and continuing odor and litter patrols around the landfill and the approach routes to the landfill."

(Nonkes Aff. Exhibit D; Am. Pet. ¶¶ 142, 212-13 [incorporating by reference the Negative Declaration, and requesting that this Court annul it]).

Thereafter, on January 1, 2022, the ERA became part of the New York Constitution (*see* https://www.elections.ny.gov/NYSBOE/elections/2021/General/GE2021_BallotProp2.xlsx (last visited February 21, 2022); *see also* NY Const art XIX, § 1).

PROCEDURAL HISTORY

This proceeding is not the first or only one in which Petitioner has brought a legal challenge concerning the Landfill. On July 25, 2018, Petitioner petitioned NYSDEC pursuant to 6 NYCRR § 621.13(b) to challenge the Landfill's Part 360 Solid Waste Management Facility Permit. *See* In the Matter of the 6 NYCRR § 621.13(b) Petition to Modify NYSDEC Part 360 Permit ID# 8-9908-00162/00032 and NYSDEC Title V Permit ID#8-99908-00162/00043 held by *Waste Management of New York, LLC*, for the High Acres Landfill, by *Fresh Air for the Eastside, Inc., et al.*, Petitioners. In March 2019, in a 19-page decision with numerous attachments, NYSDEC rejected Petitioner's contentions and denied the petition requesting modification of the Landfill's permits (*see* NYSDEC response at 15-17).[1] Petitioner did not appeal from NYSDEC's decision.

On August 14, 2018, Petitioner also commenced litigation against Waste Management and the City of New York in the Western District of New York, alleging a smattering of statutory and

[1] The NYSDEC Response is available on its website at: https://www.dec.ny.gov/docs/materials_minerals_pdf/highacresresp.pdf

tort claims (*see Fresh Air for the Eastside, Inc., et al. v Waste Mgt. of New York, L.L.C.*, US Dist Ct, WDNY, No. 6:18-cv-06588). That action remains pending, and is in the discovery stage.

On September 17, 2021, Petitioner commenced this proceeding challenging the Town's issuance of the SUP Renewal under Article 78, and amended its Petition on January 21, 2022 to also challenge the Town's decision to enter into the HCA under Article 78 as well as the federal and state constitutions.

On January 28, 2022, Petitioner filed yet another proceeding, this time against the State of New York, NYSDEC, the City of New York, and Waste Management, rehashing many of their same allegations concerning the Landfill, and asserting that the defendants in that lawsuit violated Petitioner's members' constitutional rights under New York's new ERA (*see Fresh Air for the Eastside, Inc. v State of New York*, Sup Ct, Monroe County, Index No. E2022000699).

ARGUMENT

For the reasons set forth below, Waste Management moves to dismiss Petitioner's Second, Fourth, Fifth, Sixth, and Seventh Causes of Action as a matter of law pursuant to CPLR §§ 3211 (a) (1), (a) (7), and (a) (8), as well as 7804 (f).

I. PETITIONER'S SECOND CAUSE OF ACTION FAILS AS A MATTER OF LAW BECAUSE RENEWAL OF THE LANDFILL PERMIT WAS A TYPE II ACTION NOT SUBJECT TO SEQRA REVIEW.

The Second Cause of Action must be dismissed in its entirety because, as a matter of law, renewal of the SUP was properly designated as a Type II action and thus exempt from SEQRA. Accordingly, the Second Cause of Action fails to state a claim.

Pursuant to the SEQRA regulations promulgated by NYSDEC as set forth in 6 NYCRR Part 617, "Type II actions have been determined by regulation not to have a significant effect on the environment and do not require a SEQRA determination of significance, an environmental impact statement or a findings statement" (*Village of Hudson Falls v N.Y. State DEC*, 158 AD2d 24, 29 [3d Dept 1990], *aff'd* 77 NY2d 983 [1991] [citing 6 NYCRR 617.3 [j]]). "Any action or class of actions listed as Type II in 6 N.Y.C.R.R. § 617.5 requires no further processing under SEQR. There is no documentation requirement for these actions . . . ." (NYSDEC SEQR Handbook at 26 [4th ed 2020]).

Permit renewals constitute Type II actions pursuant to 6 NYCRR § 617.5 (c) (32) of the SEQRA regulations. Section 617.5 (c) (32) states: "[t]he following actions are not subject to review under this Part: … license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities."

Permit renewals are designated as Type II actions because a project must undergo extensive review before the original permit issues. Thus, under the SEQRA regulations "[a] degree of

finality and stability is properly created once a permitted activity has successfully met the initial SEQRA requirements. In the absence of a material change in conditions or a violation of the permit, a renewal should be granted without undue burdens imposed upon the applicant" (*Village of Hudson Falls*, 158 AD2d at 30 [citations omitted]).

The SUP Renewal (Am. Pet. ¶¶ 84-105) is the renewal of a pre-existing special use permit issued by the ZBA which involves no material or substantive change in the permitted activities (*see* Am. Pet. ¶ 52). The Amended Petition does not dispute that the landfill operation was exhaustively reviewed before the issuance of the previous permit, including "with the 1993 FEIS, the November, 2000 SDEIS, the January, 2003 SFEIS, and the January, 2007 FSEIS" (Am. Pet. Exhibit E at 303; *see also* Am. Pet. ¶¶ 35-52). Petitioner nevertheless attempts to avoid the Type II treatment of the SUP renewal by improperly and inaccurately characterizing the "action" to be reviewed as the entirety of the landfill operation, rather than the SUP renewal (Am. Pet. ¶ 165). Petitioner's allegations characterizing the SEQR regulations on this point are fundamentally wrong (*e.g.*, Am. Pet. ¶¶ 160, 165, 170, 175, 179). The "action" at issue here is the permit renewal. If Petitioner's characterization of the regulations were correct, and the ZBA was required to review the entirety of the landfill operation at the time of every SUP renewal application, then Petitioner's theory would render meaningless Section 617.5 (c) (32)'s regulatory listing of permit renewals as Type II actions (*see* 6 NYCRR § 617.5 [c] [32]).[2] In essence, Petitioner asks the Court to nullify or ignore the SEQRA regulation defining permit renewals as Type II actions.

[2] Every permit authorizes some permitted activity. If, as the Amended Petition suggests, a permit renewal required re-consideration of the entire authorized activity (*e.g.*, Am. Pet. ¶¶ 159-60), then no permit renewal could ever be treated as a Type II action. The only reasonable interpretation that gives effect to Section 617.5 (c) (32) is that a permit renewal is a Type II action, without requiring *de novo* review of the entire permitted activity.

Moreover, there is no basis to require a new review of the landfill activities that were already considered at the time of the earlier issuance of the SUP (*see e.g. Stephentown Concerned Citizens v Herrick*, 280 AD2d 801, 804 [3d Dept 2001] ["The remaining activities which petitioners allege warrant type I classification … were specifically contemplated at the time the 1990 permit was issued and, therefore, DEC is not required to reconsider the environmental impacts of those activities."]). There is no need to re-assess the entirety of the landfill operations pursuant to SEQRA once the SUP Renewal was properly designated as a Type II action. Petitioner's current theory was rejected in *Village of Hudson Falls*, 158 AD2d 24, where the Appellate Division, Third Department, reversed an order annulling permit renewals because "the entirety of the over-all project was comprehensively and finally reviewed prior to issuance of the original permits . . . . The situation is unlike the initial environmental review process for the whole project, where segmentation would be inappropriate and the project must be reviewed in its cumulative whole" (*id.* at 29-30). The Third Department recognized the "clear distinction between the exhaustive SEQRA review required for Type I actions and the 'hard looks' associated therewith, and the determination involving Type II actions and SEQRA analysis associated with permit renewals" (*id.* at 30). Petitioner is, in fact, requesting that this Court ignore that distinction by claiming that the entire landfill operation must be reviewed pursuant to SEQRA in order to renew the SUP (Am. Pet. ¶¶ 160, 161, 170, 179).

The Amended Petition does not allege any facts supporting the conclusion that SUP Renewal involved a material change to the permit conditions. "When there has been no material change in the permit conditions or in the scope of the permitted activities, permit renewal applications are classified as Type II actions" (*Village of Hudson Falls*, 158 AD2d at 29). This does not mean, however, that there can never be changes to a permit being renewed. Instead, only

"material changes" prevent Type II treatment. For instance, in *Scenic Hudson, Inc. v Jorling*, petitioners alleged that "changes to the project design, ambient noise levels, visual impacts, wetland regulations, a decline in public need for the project and technological changes in coal handling" were improperly considered by NYSDEC as immaterial changes (183 AD2d 258, 262 [3d Dept 1992]). The Third Department rejected petitioners' argument and explained that "[w]hat constitutes a 'material change' in permit conditions . . . requires evaluation of factual data within DEC's expertise and DEC's interpretation is therefore to be given deference unless unreasonable" (*id.* at 262). The Third Department found that there were not material changes to the project design because the "record indicate[d] that DEC considered these changes and found that they did not materially change the existing conditions of the permit" (*id.*). "DEC set forth an adequate basis for [its] determination [] and adequately addressed the concerns presented by those against the project" (*id.*). The Third Department therefore upheld the treatment of a permit renewal as a Type II action "because there was to be no material change in permit conditions or the scope of allowed activities" (*id.* at 263).

In *Fletcher Gravel Co. v Jorling*, 179 AD2d 286, 289-90 (4th Dept 1992), the Fourth Department determined that, in the context of a mining permit renewal, "flexibility in the use and placement of equipment, as well as the height and breadth of stockpiles and the configuration of haulageways," and "the expansion of mining activity into different areas is consistent with the nature of mining and does not constitute a significant change in permit conditions" (*id.* at 289). The Fourth Department therefore ruled that "DEC could not require [the mine operator] to comply with SEQRA as a condition to the renewal of its mining permit" (*id.* at 290).

More stringent permit conditions, which are more protective of the environment, are logically not material changes and do not preclude treatment of a permit renewal as a Type II

action. For example, in *Fletcher Gravel*, the "determination to require permits for [air emissions sources] that did not previously require permits . . . [did] not constitute a material change in permit conditions" for the subject mining permit (179 AD2d at 290).

As admitted in the Amended Petition, the ZBA considered the SUP Renewal and found no material changes, stating as follows:

> "The SUP application before the ZBA is a renewal of an existing permit . . . . [6 N.Y.C.R.R. §] 617.5(c)(32) states that "license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities" are considered Type II Actions where no further environmental review is warranted.
>
> Guidance from the NYSDEC SEQR Handbook provides examples of a "material change". For example, allowing a permit holder to change the allowable depth or height of a mine facility or resign access pints to a shopping mall so that shoppers would enter a highway ta different location is considered material changes to a previously approved project. In our particular case, and as described by the applicant, ***there is no change to the type of waste being accepted, the volume of waste being accepted, method by which waste is being delivered to the facility, the method by which the waste is being landfilled, or the size/footprint of the landfill being proposed as part of this application***. Therefore, it is our intent to treat this application as a SEQR Type II Action.
>
> For background information, the SEQR process/procedure was previously conducted and completed for High Acres Landfill (and its various expansions) with the 1993 FEIS, the November, 2000 SDEIS, the January, 2003 SFEIS, and the January, 2007 FSEIS."

(Am. Pet. Exhibit E at 303 [emphasis added]; *see also id.* at 293 [recording the determination of the Perinton Conservation Board that it "concur[red] with the Town Staff and the Town Attorney that the proposed action be advanced as [a] Type II Action" and providing its rationale]). The Amended Petition does not contain any factual allegations to contradict these statements.

Most notably, again as admitted in the Amended Petition, NYSDEC (the New York State agency that governs the implementation of SEQRA and the SEQRA regulations) confirmed by

letter dated August 25, 2021, that the ZBA properly treated the SUP renewal as a Type II action exempt from SEQR review pursuant to Section 617.5 (c) (32) of the SEQRA regulations. NYSDEC wrote in the August 25, 2021 letter (attached as Exhibit C to the Amended Petition):

> "[T]he action that was pending before the ZBA was a renewal and renewals are Type II actions, which means that they are not subject to further review under SEQR."

(Am. Pet. Exhibit C at 3). Thus, the Court need look no further than the Amended Petition itself to see that both the ZBA and NYSDEC determined that the SUP Renewal was a Type II action exempt from SEQRA review. Those determinations are entitled to great deference (*see Scenic Hudson, Inc.*, 183 AD2d at 262 ["What constitutes a 'material change in permit conditions, however, requires evaluation of factual data within DEC's expertise and DEC's interpretation is therefore to be given deference unless unreasonable."]; *City Council of the City of Watervliet v Town Bd. of the Town of Colonie*, 3 NY3d 508, 518 [2004]).

The SUP Renewal's status as a Type II action also refutes as a matter of law Petitioner's conclusory allegations that other agencies were required to be involved agencies (*see* Am. Pet. ¶¶ 173, 174). In addition, NYSDEC confirmed that renewal of the SUP involved no modification of the landfill's Part 360 or Title V permit, so that NYSDEC could not have been an involved agency (Am. Pet. Exhibit C at 3 ["The Department could not have been an involved agency because WM did not request a modification of its Part 360 or Title V permit . . . DEC could not have been an involved or lead agency."]). The Amended Petition contains no allegation to the contrary (*see* Am. Pet. ¶ 173). The allegation that the Town Board should have been an involved agency based on the need for an HCA prior to issuance of an SUP (*id.* ¶ 174), is similarly unavailing. As the Amended Petition acknowledges, at the time the SUP was renewed, an HCA between the Town and Waste Management was in effect, the Town having continually renewed it on a month-to-month basis. Regardless, no involved agencies were required because the SUP

Renewal was a Type II action (6 NYCRR 617.5 [a] [exempting Type II actions from review]; *see also* 6 NYCRR 617.5 [b] ["An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency."]; 6 NYCRR 617.6 [a] [2] [requiring identification of involved agencies only for a Type I action]).

Petitioner does not identify any material change to permit conditions or activities that would require treatment of the SUP Renewal as anything other than a Type II action. The Amended Petition lists in conclusory fashion supposed "material changes," but it does not allege any facts suggesting that any of these are beyond the scope of the landfill's existing SUP and Part 360 permits (Am. Pet. ¶ 77). For example, the Amended Petition pays particular attention to landfilling in Cells 10 and 11, but it does not allege that the use of Cells 10 and 11 is beyond the scope of the activities permitted by initial SUP or Part 360 permit; instead, it was—and remains—authorized by the permits (Am. Pet. ¶¶ 79-80). In short, each alleged "material change" listed in paragraph 77 of the Amended Petition is incidental to the permitted landfill operation and already within the permitted activity; these do not constitute material changes to existing, permitted landfill activities (*see Fletcher Gravel Co.*, 179 AD2d at 289-90 ["The DEC's determination to require permits for items that did not previously require permits, many of which were already in use at petitioner's site and of which DEC was aware, does not constitute a material change in permit conditions."]). The Amended Petition does not state a claim here because it does not allege a single material change falling outside the pre-existing SUP that was renewed.

In light of the foregoing, the Second Cause of Action set forth in the Amended Petition must be dismissed in its entirety as a matter of law. Even accepting all of the factual allegations as true, it fails to state a cause of action.

II. PETITIONER'S FOURTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE GENERAL MUNICIPAL LAW SECTION 239-M DID NOT REQUIRE THE TOWN TO REFER THE APPLICATION TO RENEW THE LANDFILL PERMIT TO THE MONROE COUNTY DEPARTMENT OF PLANNING.

Waste Management joins the Town in moving to dismiss Petitioner's Fourth Cause of Action—the claim that the Town violated GML § 239-m—pursuant to CPLR § 3211 (a) (1) because the claim is refuted by documentary evidence. Waste Management incorporates by reference the arguments set forth by the Town in its motion papers.

III. PETITIONER'S FIFTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE ITS SEQRA CHALLENGES FAIL AS A MATTER OF LAW.

The Fifth Cause of Action presents various criticisms of the publicly elected Town Board's SEQRA review of the HCA, none of which states a valid claim for relief. As an initial matter, Petitioner misinterprets and misapplies Section 617.2 (ah) of the SEQRA regulations governing segmentation to assert that the SUP renewal and the HCA should have been reviewed simultaneously and, thus, "the ZBA and Town Board illegally segmented the SEQRA review" (Am. Pet. ¶¶ 205-06).[3] Section 617.2 (ah) of the SEQRA regulations defines segmentation as "the division of the environmental review of an action ***such that various activities or stages are***

[3] The Amended Petition also provides Petitioner's thoughts on the Town's "intent" of the Town Code (Am. Pet. ¶ 115) (the "intent of the Town Code clearly is for the HCA and the Landfill Permit to be issued and executed in unison so that the review of the Landfill Permit application can assess the enforcement mechanisms in the HCA."). The Perinton Town Code is best interpreted, however, by reviewing its plain language (*see* Perinton Town Code § 208-21 [D] [5]), which does not support Petitioner's theories. Nothing suggests that the HCA and permit are to be issued and executed in unison. The argument is nevertheless irrelevant because Petitioner concedes that the 2013 HCA was effective until it was replaced by the new HCA in December 2021, satisfying the requirement of Perinton Town Code § 208-21 [D] [5] that the Town Board have a contract governing the operation of the Facility at the time the ZBA approved the SUP Renewal (Am. Pet. ¶¶ 109-13).

addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance" (6 NYCRR § 617.2 [ah] [emphasis added]; *see also* NYSDEC SEQR Handbook at 53 ["attempts to avoid a thorough environmental review (often an EIS) of a whole action by splitting a project into two or more smaller projects [or] where activities that may be occurring at different times or places are excluded from the scope of the environmental review"]). The Amended Petition does not allege any activity at the Landfill was carved off for separate review.

Petitioner's assertion conveniently ignores that the SUP Renewal was a Type II action exempt from SEQRA review (6 NYCRR § 617.5 [a], [c] [32]). As a Type II action, a determination of significance is not required (6 NYCRR § 617.3 [f]). When an action is designated as a Type II action, it can be properly segmented from the remainder of a project because there is no requirement that the Type II action needs an individual determination of significance and thus there is no attempt to evade environmental review (6 NYCRR § 617.2 [ah]; *see also Matter of Rodgers v City of N. Tonawanda*, 60 AD3d 1379 [4th Dept 2009] [holding that the storm sewer outlet replacement project was a Type II action that was properly segmented from the Gateway Point Park Project]; *Settco, LLC v NY State Urban Dev. Corp.*, 305 AD2d 1026 [4th Dept 2003] [finding that conveying title to a property for redevelopment is a Type II action that was properly segmented from the casino project]; *Matter of Bd. of Mgrs. of the Plaza Condominium v NY City Dept. of Transp.*, 43 Misc 3d 1219(A), 2014 Slip Op 50718[U] [Sup Ct, NY County 2014], *aff'd* 131 AD3d 419 [1st Dept 2015]; *Matter of Booth v Planning Bd. of the Vil. of Perry*, 2013 NY Slip Op 30648[U], at *4 [Sup Ct, Wyoming County 2013] ["the Court notes that, generally, determinations on 'type II actions' may properly be segmented from review of other actions."]).

Here, the SUP Renewal, as a Type II action, was properly segmented from the environmental review of the Town Board's approval of the HCA (which the Town Board deemed a Type I action).

Petitioner then alleges that "[a]s a Type I action, a coordinated SEQRA review with all involved agencies, including DEC and the ZBA, was required to be conducted before any actions were taken," without specifying what "action" it contends was a Type I action (*see* Am. Pet. ¶ 219). Not only does Petitioner fail to identify a Type I "action," but Petitioner fails to explain why NYSDEC or the ZBA were involved agencies. An involved agency is "an agency that has jurisdiction by law to fund, approve or directly undertake an action" (6 NYCRR § 617.2 [t]). To the extent Petitioner alleges that the Type I action was the Town Board's approval of the HCA, the HCA is between two parties: the Town Board and Waste Management. The approval of the HCA does not involve any agency other than the Town Board. Neither NYSDEC nor the ZBA could have been an involved agency as a matter of law (*see e.g. Concerned Citizens of Cattaraugus County v Town Bd. of Town of Farmersville*, 221 AD2d 1010 [4th Dept 1995] [finding that a town board's approval of an agreement under Town Law § 64 (6) with a private entity operating a landfill is not subject to a SEQRA review). For the same reason, with respect to the SUP Renewal, NYSDEC explained in its letter dated August 25, 2021 to Petitioner that:

> "The Department [DEC] could not have been an involved agency because WM did not request a modification of its Part 360 or Title V permit. Accordingly, DEC did not have discretionary permitting jurisdiction with regard to the renewal of the Special Use Permit and without such jurisdiction, DEC could not have been an involved or lead agency."

(Am. Pet. Exhibit C at 3).

The Amended Petition similarly provides no basis for the conclusory allegation that the ZBA should have been treated as an involved agency in the Town Board's SEQRA review of the HCA. As a matter of law, the ZBA had no jurisdiction over the approval or authorization by the

Town Board to enter into the HCA with Waste Management (*see* Town Law § 64 [6]). The ZBA's jurisdiction was restricted to determining whether to grant the SUP Renewal. Because the SUP Renewal was a Type II action exempt from SEQRA, the ZBA did not retain an involved agency status that would be coordinated into the Town Board's SEQRA review of the HCA. The Amended Petition simply fails to allege any basis for its conclusion that NYSDEC or the ZBA were involved agencies for the HCA approval.

Finally, Petitioner challenges the Town Board's issuance of a Negative Declaration for the approval of the HCA (Am. Pet. ¶ 212). In particular, the Amended Petition makes the conclusory allegation that "[i]n making its Negative Declaration, the Town Board failed to take a hard look at the Landfill Activities, and failed to make an adequate reasoned elaboration, in violation of 6 N.Y.C.R.R. §617.7(b)" (*id.*). Petitioner misses that the action being considered by the Town Board was whether to approve the HCA and authorize the Town Supervisor to execute it. The Town Board was not reviewing the environmental impacts of the landfill operations. Petitioner fails to allege any facts suggesting that the approval of an agreement by a Town Board results in a single environmental impact, never mind a potentially significant adverse one.

The Negative Declaration itself refutes Petitioner's allegations.[4] It was accompanied by a Full Environmental Assessment Form (Nonkes Aff. Exhibit D; *see also* Am. Pet. ¶ 139), and the Negative Declaration sets out in detail the Town Board's reasoning:

> "**Reasons Supporting this Determination**: That this renewal of the benefits agreement will provide additional benefits from previous agreements, as well as additional protections, applicable town wide and will prove to be ***no less protective of the environment***. Benefits and safeguards include, but are not limited to, a property value

[4] The Amended Petition refers to the Negative Declaration in at least paragraphs 142, 212, and 213, and it directly challenges the Negative Declaration (Am. Pet. ¶ 213). The Negative Declaration (Nonkes Aff. Exhibit D) is therefore properly before the Court on this motion to dismiss.

> protection program; restrictions on aged waste being accepted at the landfill; annual volume limitation on the amount of waste being delivered by rail from New York City; revenue benefits; the creation of a Citizens Advisory Committee; continued environmental monitoring with some of the most restrictive limits placed on a facility of this nature in the State; Operations and Maintenance plan modifications, including air monitoring and information sharing requirements; and continuing odor and litter patrols around the landfill and the approach routes to the landfill."

(Nonkes Aff. Exhibit D [emphasis added]). Accordingly, the Town Board properly conducted an independent review of the approval of the HCA as a Type I action and provided a written reasoned elaboration for its determination. The Amended Petition provides only a speculative and conclusory allegation that the Town "would have identified at least one potentially significant adverse impact on the environment resulting from this action" (*see* Am. Pet. ¶ 211) and wholly fails to allege any way in which the new HCA (Am. Pet. Exhibit G) was less protective of the environment than the 2013 HCA that it replaced (*see* Am. Pet. ¶¶ 109, 110, 118). Petitioner has accordingly failed to state a claim for which relief may be granted and, therefore, the Fifth Cause of Action must be dismissed in its entirety as a matter of law.

IV. PETITIONER'S SIXTH CAUSE OF ACTION FAILS TO STATE ANY CLAIM UNDER THE NEW YORK STATE OR FEDERAL CONSTITUTIONS.

Waste Management joins the Town in moving to dismiss Petitioner's Sixth Cause of Action, which presents vaguely described claims under the federal and state constitutions. For the reasons explained by the Town, there has been no violation of Equal Protection, Due Process, free speech or the right to petition. Further, the Town could not have violated the ERA when it approved and entered into the HCA in December 2021 because the ERA was not a part of the New York State Constitution at that time, and did not become part of the New York State Constitution until January 1, 2022 (*see* NY Const art XIX § 1). Waste Management incorporates by reference the arguments set forth by the Town in support of dismissing Petitioner's Sixth Cause of Action.

V. PETITIONER'S SEVENTH CAUSE OF ACTION IS MERELY AN IMPROPER CATCH-ALL CLAIM WHICH FAILS TO STATE A CAUSE OF ACTION.

Waste Management joins the Town in moving to dismiss Petitioner's Seventh Cause of Action, which presents an improper catch-all claim. Waste Management incorporates by reference the arguments set forth by the Town in support of dismissing Petitioner's Seventh Cause of Action.

VI. PETITIONER'S DECLARATORY JUDGMENT CAUSES OF ACTION FAIL DUE TO A JURISDICTIONAL DEFECT.

The portions of the Amended Petition which seek a declaratory judgment must be dismissed for lack of jurisdiction under CPLR § 3211 (a) (8) due to Petitioner's failure to serve a summons. Whereas a CPLR Article 78 may be commenced by the filing of a petition accompanied by a notice of petition (*see* CPLR 7804 [c]), an ordinary "action is commenced by filing a summons and complaint or summons with notice" (CPLR 304 [a]). "[T]he valid commencement of an action is a condition precedent to [Supreme Court's] acquiring the jurisdiction" (*Town of Cicero v Lakeshore Estates, LLC*, 152 AD3d 1168, 1169 [4th Dept 2017] [citations omitted]). "To acquire personal jurisdiction over an individual defendant for purpose of an ordinary action by complaint, the plaintiff must be served with a summons" (*see* CPLR § 308).

Petitioner has not filed or served a summons in this case. This is a jurisdictional defect, and the Court must therefore dismiss those portions of the Amended Petition seeking declaratory judgment, particularly, the Sixth Cause of Action.

CONCLUSION

In light of the foregoing, Waste Management respectfully requests that the Court dismiss the Petition, set a schedule for the remainder of this Proceeding, and grant such other relief that this Court deems just and proper. Waste Management also respectfully requests that the Court grant Respondents thirty (30) days after this Court's issuance of a decision on the instant motions to dismiss to file answers to whatever causes of action might remain in the Amended Petition. The Amended Petition presents a host of vaguely-alleged claims in 225 paragraphs, and it includes seven denominated causes of action, some of which assert an unexplained combination of legal theories. We expect the administrative record associated with the Town's approval of the Special Use Permit and HCA to include thousands of pages. Under the circumstances, it is respectfully submitted that thirty (30) days would be an appropriate amount of time to prepare and file answering papers.

Dated: February 22, 2022
Pittsford, New York

Respectfully Submitted,

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