SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

THE PEOPLE OF THE STATE OF NEW YORK AND THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,	:	Index No.: 907689-22
Plaintiff,	:	**NORLITE LLC'S MEMORANDUM IN SUPPOPRT OF ITS MOTION TO DISMISS COUNT ONE OF THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE CERTAIN ALLEGATIONS**
-against-	:	
NORLITE, LLC,	:	Motion Sequence No. 001
Defendant.	:	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST COUNT OF THE COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE ANY ALLEGATION OF THE VIOLATION OF NUMERIC CRITERIA NOT PROMULGATED PURSUANT TO NEW YORK LAW

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Defendant Norlite, LLC ("Norlite") moves (1) dismiss the First Count of the Complaint pursuant to Civil Procedure Law and Rules ("CPLR") 3211(a)(7) based on, *inter alia*, the failure of the Plaintiffs to state a claim upon which relief can be granted, or, in the alternative, (2) to strike paragraphs [103-105, 108-112, 137, 138, 140-143] of Plaintiffs' Complaint, dated October 11, 2022 (the "Complaint") pursuant to CPLR 3024(b).

PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation ("DEC") and the People of the State of New York (together with DEC referred to herein as "Plaintiffs" or the "State") brought this lawsuit claiming that Norlite has generated fugitive dust in violation of New York regulations and permits issued by the State. However, the "standards" that the State claims Norlite has violated have never been promulgated by the State, incorporated into Norlite's permits, or otherwise been the subject of any proceedings that would have afforded Norlite, or the regulated community in general, due process or notice of the standards to which their operations are subject. Regulatory agencies like DEC are required by law to provide notice of and the opportunity to comment on standards they intend to impose on industry, so industry can take steps to comply with such standards, once finalized. The State could have either (1) promulgated these standards through the rule-making process authorized under the New York State Administrative Procedures Act ("SAPA"), or (2) sought to include such standards in Norlite's operating permits (for which renewal applications are currently pending before DEC.)[1] The State has done neither, but instead is impermissibly seeking to impose these "standards"

[1] Norlite has a hazardous waste permit under the Resource Conservation & Recovery Act ("RCRA"), an air emissions permit under Title V of the Clean Air Act ("CAA"), and a State Pollution Discharge Elimination System permit under the Clean Water Act ("CWA'). All of these permits remain in effect while the State reviews pending renewal applications.

through this enforcement action. The court should not condone this behavior and should instead dismiss any counts or allegations relying solely on the alleged exceedance of these "standards".

BACKGROUND

Norlite owns and operates a facility located largely in Cohoes, New York at which it mines shale and processes it to produce a lightweight aggregate building product (the "Facility"). The State has issued several permits authorizing Norlite's operations. Several of those permits incorporate Norlite's Fugitive Dust Plan, which identifies various sources of potential fugitive dust emissions at the Facility and describes measures that Norlite takes to control fugitive dust emissions.[2]

One measure of dust is referred to as "particulate matter" or "PM", which can be broken down by particle size, such as PM_{10} (particle sizes of less than 10 microns) and $PM_{2.5}$ (particle sizes of less than 2.5 microns). The United States Environmental Protection Agency ("EPA"), under the authority of the Clean Air Act, has identified certain pollutants, including PM, as "criteria pollutants" for which EPA has established National Ambient Air Quality Standards ("NAAQS").[3] The NAAQS for $PM_{2.5}$ is 12.0 micrograms per cubic meter (ug/m^3) (annual average) and 35 ug/m^3 (24-hour average). The NAAQS for PM_{10} is 150 ug/m^3 (24-hour average).[4] The State has not promulgated more stringent standards, meaning the EPA standards apply in New York.

Among the allegations the State makes in this action is that Norlite is emitting particulate matter and crystalline silica in violation of state regulations. However, noticeably absent is any

[2] The last Fugitive Dust Plan approved by the State is from 2014. Norlite submitted an updated Fugitive Dust Plan in 2021 which Norlite believes is being reviewed as part of the State's review of the pending permit renewal applications.
[3] *See, generally,* 42 U.S.C. §§ 7408, 7409.
[4] *See* "Integrated Review Plan for the National Ambient Air Quality Standards for Particulate Matter", U.S. Environmental Protection Agency, December 2016 at pp. 1-11 to 1-12 (Table 1-2).

allegation that Norlite is emitting PM in violation of the NAAQS or any other State regulation or permit limit with regard to either PM or crystalline silica. Instead, the State relies on standards from other states or guidelines not promulgated under the New York Administrative Procedures Act.

ARGUMENT

I. THE COURT SHOULD DISMISS COUNT ONE OF THE COMPLAINT BECAUSE PLAINTIFFS RELY SOLELY ON CONCLUSORY ALLEGATIONS AND ALLEGED VIOLATIONS OF NUMERIC CRITERIA NOT PROMULGATED UNDER NEW YORK LAW

The First Count of the Complaint should be dismissed pursuant to CPLR 3211(a)(7) because it fails to state a cause of action. The First Count of the Complaint is based on two types of allegations: (1) allegations that Norlite has violated numeric criteria that have not been promulgated under New York law and are thus not enforceable, and (2) allegations that are vague and conclusory, or are bare legal conclusions, which are insufficient to support a claim. These allegations cannot support a cause of action, and as such the First Count should be dismissed.

A. Standard of Review

A complaint, to survive a motion to dismiss, "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp*., 87 A.D.3d 836, 839 (1st Dep't 2011); see also CPLR 3211(a)(7). "[A]llegations consisting of bare legal conclusions, as well as factual claims that are contradicted by documentary evidence, are not entitled to such consideration." *CIBC Bank & Tr. Co. v. Credit Lyonnais*, 270 A.D.2d 138, 138 (1st Dep't 2000). "Vague and conclusory allegations" do not suffice. *See, e.g., Marino v. Vunk*, 39 A.D.3d 339, 340 (1st Dep't 2007) (affirming dismissal of breach-of-contract claim); *Cruciata v O'Donnell &*

Mclaughlin, Esqs., 149 A.D.3d 1034, 1035 (2d Dep't 2017). "Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions, as well as factual claims flatly contradicted by the record, are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible." *Everett v Eastchester Police Dept*., 127 A.D.3d 1131, 1132 (2d Dep't 2015) (quotations and citations omitted).

New York courts have dismissed claims under CPLR 3211(a)(7) when they are based only on "vague and conclusory" allegations. Furthermore, "dismissal of a pleading or cause of action is warranted if the pleading party fails to assert facts in support of an element of the claim…" *Naegele v. Fox*, 206 A.D.3d 1558, 1559 (4th Dep't 2022). For example, in *Naegele v. Fox,* defendant's counterclaim of conspiracy in a matter related to a residential construction project was dismissed because defendant "failed to substantiate his counterclaim with detailed factual information about the alleged conspiracy." *Id.* at 428 (quoting *Ford v. Snashall*, 285 A.D.2d 881, 882 (3d Dep't 2001) (internal quotation marks omitted). Instead, the material allegations in the counterclaim consisted of "vague and general repetitions of defendant's prior claims that [his neighbor the plaintiff] had a conflict of interest and some unspecified communications with certain government actors…as well as bare legal conclusions that plaintiffs and the Town acted in concert and conspired to apply new zoning provisions retroactively to his property." Id. at 428-29. These vague and conclusory allegations were insufficient to support defendant's counterclaim, which was dismissed pursuant to CPLR 3211(a)(7).

In addition, New York courts have dismissed claims because they are based on inapplicable laws from the wrong jurisdiction. For example, in a matter alleging violations of New York labor law on a federally-funded project, the court held that New York labor law was

preempted by federal law. *Majstrovic v. R. Maric Piping, Inc*., 171 Misc.2d 429, 430-31 (N.Y. Sup. Ct. 1997). Since three of the causes of action in the complaint were based on New York (rather than federal) law, they were dismissed for failure to state a claim. *Id.* at 431-33. Similarly, in a personal injury matter involving a rail traveler distracted by a billboard at Grand Central Station, a claim was dismissed because it was based on inapplicable standards. *Njewadda v. Showtime Networks, Inc.*, 63 Misc.3d 256, 266 (N.Y. Sup. Ct. 2019). Plaintiff sought to rely on the 1997 MTA Advertising Standards to justify her claim that the MTA was negligent in its operation of Grand Central Station by placing an advertisement under the stairs of a subway which allegedly caused plaintiff to fall. *Id.* at 259. The court dismissed the claims stating that the MTA Advertising Standards were inapplicable to the case. *Id.* at 266.

B. The State Cannot Rely On Numeric Criteria From Other Jurisdictions or Guidelines, None Of Which Have Been Properly Promulgated Under New York State Administrative Procedures Act, To Support A Claim That Norlite Has Violated 6 NYCRR § 211.1.

The regulation at issue in Count One in this case is 6 NYCRR § 211.1, which states, in part, that one cannot cause emissions of air contaminants at levels "injurious to human, plant or animal life."[5] The State claims that Norlite has violated this regulation, first because it has allegedly caused emissions of particulate matter in violation of standards established in California[6], notwithstanding the fact the DEC has not, and cannot, allege that Norlite has violated the NAAQS which are the applicable particulate matter standards in New York. *See* Complaint, ¶¶ 140-142 (alleging that particulate matter levels have been "significantly above a level determined to be protective of the health of the public with an adequate margin of safety" – referring to the California levels.) Second, the State alleges that Norlite has caused emissions of

[5] In filing this Motion, Norlite does not waive any rights to challenge 6 NYCRR § 211.1 as unconstitutionally vague or otherwise unenforceable.

[6] *See* Complaint, ¶¶ 108-109, where the Plaintiffs discuss the promulgation of standards by the California Air Resources Board and the California Office of Environmental Health Hazard Assessment, none of which have been promulgated in New York.

crystalline silica above an Annual Guideline Concentration ("AGC") level found in a state guidance document (DAR-1) that has not been subject to review and comment and does not appear to be applicable to the regulation in question here (6 NYCRR 211.1). *See* Complaint, ¶¶ 137-138, 143. Outside these allegations, all that are left in Count One are vague and conclusory statements of conditions allegedly injurious to human life. *See* Complaint, ¶¶ 144-145. There are no allegations of actual or suspected injuries caused by emissions from the Facility. These allegations, without more factual support, cannot support a claim that Norlite has violated 6 NYCRR 211.1 by causing emissions that are "injurious to human life", and thus Count One should be dismissed.

a. The purported numeric criteria and "protective of health" standard found in the Complaint are not enforceable against the Facility

DEC is authorized to promulgate regulations related to air emissions pursuant to ECL §§ 19-0301 and 19-0303. However, to promulgate those regulations DEC must follow the rule-making procedures in § 202 of SAPA and the requirements of ECL § 19-0303. An administrative agency seeking to promulgate a new rule must provide notice and an opportunity for public comment. SAPA § 202(a). To the extent the State wants to impose environmental regulations more stringent than state statute or federal environmental regulations the procedural requirements are especially rigorous. In those circumstances, DEC is required to prepare "a detailed explanation of the reason or reasons that justify exceeding federal minimum requirements" and a review of cost impacts and alternatives. ECL § 19-0303(4). These requirements are intended to provide stakeholders with an opportunity to review and comment upon regulatory language and emission limits.

When an agency does not follow the rule-making procedures in SAPA § 202 and attempts to enforce a new rule, courts have held those rules to be null and void and found for the

regulated party. *See e.g. Household & Com. Prod. Ass'n v. New York State Dep't of Env't Conservation*, 65 Misc. 3d 832 (N.Y. Sup. Ct. 2019). In *Household and Commercial Products Assoc.*, the issue was the enforceability of a DEC program and guidance document requiring that producers of cleaning products provide "extensive and detailed information" on product formulation and a certification form attesting under penalties of perjury that such information was true, accurate and complete. *Household and Commercial Products Assoc.* 65 Misc. 3d 832, 838. These new requirements far exceeded the requirements of the duly promulgated household cleaning product disclosure regulations. *Id.* at 836-37 (discussing regulations promulgated and found at 6 NYCRR § 659.6). The court held that the new disclosure requirements constituted a clear rule, and since it had not been promulgated in accordance with the requirements of SAPA, the court invalidated it in its entirety. *Id.* at 841. *See also HLP Properties, LLC v. New York State Dep't of Env't Conservation*, 21 Misc. 3d 658, 670-71 (Sup. Ct. 2008), aff'd, 70 A.D.3d 469, 898 N.Y.S.2d 449 (2010) (holding that DEC "guidance factors" regarding eligibility for brownfield site status were an impermissible attempt to legislate).

It is clear that the California PM_{10} criteria may not be enforced against the Facility. Since the Facility is in New York and subject to New York law, the California criteria have no applicability. The Complaint alleges that the California criteria are "protective of health . . . with an adequate margin of safety," but this language is not the language at issue in 6 NYCRR § 211.1, which prohibits emissions that "<u>are</u> injurious to human, plant or animal life."[7] DEC has simply borrowed language and numeric PM_{10} criteria from California without following any of the procedures required by SAPA § 202. The "protective of health" language and the PM_{10} emissions levels associated with it have never been subject to public review and comment by

[7] The "protective of health . . . with an adequate margin of safety" language is not found in 6 NYCRR § 211.1. While such a standard may be relevant in a rule-making proceeding, this is not such a proceeding (though a rule-making proceeding is exactly the type of proceeding the State has failed to undertake.)

Norlite or any other stakeholders. As such, any attempt to enforce the California criteria against Norlite must fail.

The AGCs likewise cannot be enforced against the Facility. As the very title of the document makes clear, the AGCs are a form of guidance rather than a rule. A guidance document includes "any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement." SAPA § 102(14). In contrast to an enforceable rule, "[m]ere guidelines… do not establish substantive standards applicable to agency adjudication, but merely implement, explain or interpret an already existing standard or requirement set forth in a regulation or statute." *Household and Commercial Products Assoc.* 110 N.Y.S.3d at 525.[8] Guidelines may not impose new requirements on regulated parties that extend beyond what is contained in a regulation. *See id.*; *HLP Properties, LLC v. New York State Dept. of Environmental Conservation*, 864 N.Y.S.2d 285, 293 (Sup. Ct. Sep. 12, 2008); *Destiny USA Development, LLC v. New York State Dept. of Environmental Conservation*, 879 N.Y.S.2d 865, 868 (N.Y. App. Div. 2009) (each holding that "an agency, by law, is not allowed to 'legislate' by adding 'guidance requirements' not expressly authorized by statute").

Courts have rejected attempts by DEC to bind regulated entities with mere guidance. In *HLP Properties*, the plaintiffs challenged DEC's determination denying plaintiffs' application to participate in the Brownfield Cleanup Program. *HLP Properties*, 21 Misc.3d at 659. The statute under which plaintiffs filed their initial application allowed an application for any property which contained contamination that might complicate development or reuse. *Id.* at 668.

[8] The Court should reject any attempt by the State to argue that the guidelines are intended to explain or interpret 6 NYCRR § 211.1. The AGCs are titled "Guidelines for the Evaluation and Control of Ambient Air Contaminants Under 6 NYCRR Part 212." The document states that the "guidance contained in this document is primarily intended for use in conjunction with the NYSDEC's permitting and regulatory authority found in 6 NYCRR Parts 200, 201, 212 and 257" and makes no mention of 6 NYCRR 211.1.

However, in denying plaintiffs' application, DEC applied four "guidance factors" to determine the eligibility of plaintiffs' property that were not supported by the language of the statute and had not been adopted by the legislature. *Id.* at 669-70. The court found that DEC's use of these guidance factors represented an impermissible attempt to legislate and reversed DEC's decision with a direction to accept plaintiffs' property into the brownfield program. *Id.* at 671. Similarly, any attempt by DEC to bind Norlite to the AGCs must be rejected.

Since the AGCs and California PM_{10} criteria have not been incorporated into any statute or regulation duly promulgated in New York they cannot be enforced against Norlite, and the State cannot allege that Norlite has violated 6 NYCRR 211.1 based on levels in excess of these criteria. Absent other factual allegations, other than the conclusory allegations discussed below, Count One must be dismissed.

b. The First Count of the Complaint should also be dismissed because it relies on vague and conclusory allegations.

Beyond the allegations of violations of unenforceable standards discussed above, the First Count of the Complaint is otherwise only supported by vague and conclusory allegations and should be dismissed. For example, the State makes allegations about "emissions of PM_{10}" (paragraph 144) or "emissions of air contaminants" (paragraph 145) that are "injurious to human life", but makes no further allegation of how such emissions are or have been (as opposed to could be) injurious. The Complaint alleges that "exposure" to elevated PM levels is "linked" or "associated" with various maladies and symptoms but does not provide a basis for those allegations. Complaint, ¶¶ 2, 31, 101, 118-124. The Complaint similarly includes a vague allegation that inhalation of crystalline silica "can" cause lung and renal ailments. Complaint ¶ 101. Plaintiffs do not allege that any particular concentration of PM or crystalline silica represents a threshold above which injuries are known, or even likely, to occur. Indeed,

Plaintiffs admit that the 24-hour NAAQS standard of 150 µg/m3 for PM_{10} (which they do not allege Norlite has exceeded) minimizes adverse health effects, which undercuts even their misdirected arguments. Complaint ¶ 107. Plaintiffs also do not allege that any individual or group of individuals has suffered an actual injury as a result of Norlite's alleged emissions of PM or crystalline silica. Plaintiffs have failed to allege that Norlite's emissions are "injurious to human, plant, or animal life" except in vague and conclusory terms. As such, the First Count should be dismissed pursuant to CPLR 3211(a)(7).

II. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE ANY PARAGRAPHS ALLEGING VIOLATIONS OF NUMERIC CRITERIA OR GUIDELINES THAT HAVE NOT BEEN PROMULGATED PURSUANT TO THE NEW YORK STATE ADMINISTRATIVE PROCEDURES ACT

Pursuant to CPLR § 3024(b), a party may "move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "Material is scandalous if it is both immaterial and reproachful or capable of producing harm without justification. Material is prejudicial when it impairs a substantial right of a party or causes harm to the party and is not necessary to the party's pleading." *Walsh v. Endresen*, 2009 WL 1106556, 22 (Sup. Ct. N.Y County, 2009) (citing *Walker v. Sheldon*, 12 A.D.2d 456, 207 N.Y.S.2d 176, appeal granted 12 AD2d 740, affirmed 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1st Dep't 1960)). A matter is unnecessary if it is irrelevant. *Wegman v. Dairylea Co-op., Inc*., 50 A.D.2d 108, 111 (N.Y. App. Div. 1975). "A matter is relevant to a pleading if it would be admissible at trial under the evidentiary rules of relevancy." *Conway & Conway v. Kaplan*, 2021 WL 318253 at *3 (N.Y. Sup. Ct. 2021) (citing *New York City Health and Hosp. Corp. v St. Barnabas Cmty. Health Plan*, 22 AD3d 391, 391 (1st Dep't 2005)); *Cassissi v. Yee*, 46 Misc.3d 552, 557 (N.Y. Sup. Ct. 2014). Allegations that are stricken from a pleading may still be proven at trial if they are relevant even though they do not appear in the complaint. *Wegman*, 50 A.D.2d at 111.

In *Wegman v. Dairylea Co-op., Inc*., 50 A.D.2d 108, 111 (N.Y. App. Div. 1975), which involved an employment contract dispute, the defendants sought to strike allegations in the complaint concerning apparent violations of statutes and regulations concerning the adulteration of milk. *Id.* The court found that because the burden on the plaintiff extended only to proving the existence of an employment contract for a specified term and the termination of that contract before the term expired, the issue of milk adulteration, though it could potentially be raised at the trial, was not necessary at the pleading stage and that it could "instill undue prejudice in the jury." *Id.* The court further found that the plaintiff would not suffer any prejudice as a result of the court's decision, but that a failure to strike the allegations regarding milk adulteration could result in prejudice to the defendant. *Id.* *See also, Conway*, 2021 WL 318253 at *1 (granting defendants' motion to strike the allegations regarding defendants' prior litigation history and the time that plaintiffs spent defending a legal malpractice suit, finding that those allegations were unnecessary and prejudicial for the plaintiffs' current breach of contract claims).

Plaintiffs, through reference to California standards and New York guidelines, is attempting to enforce numeric criteria that have not been properly promulgated in New York. Reference to these purported standards is prejudicial and irrelevant, as they are not legally enforceable in New York and impair Norlite's substantial rights. Furthermore, not only are these allegations capable of producing harm without justification, but in fact these allegations have caused significant reputational harm to Norlite among its customers and the public on the basis that Norlite has violated health-based standards that do not in fact exist in Norlite permits or New York law and that have never been communicated to Norlite prior to this action. Norlite has the right to know the standards to which it is being held so it can conduct its operations to meet those standards. (Cite.) This is the fundamental purpose of notice and comment rulemaking

proceedings, and the State has deprived Norlite of these rights by foregoing such proceedings. By purporting to apply these numeric criteria to the Facility, and alleging that Norlite has violated these purported standards, the Complaint gives the misleading impression that such criteria are enforceable as to the Facility and that the Facility violated these purported health-based standards regardless, which is highly prejudicial and harmful.

Therefore, any allegations purporting to apply or reference numeric standards, when such numeric standards have not been promulgated in accordance with New York law, are prejudicial, harmful, and unnecessary and should be stricken. More specifically, paragraphs [108-112 and 140-142] should be stricken because they purport to apply California PM_{10} standards when such standards have not been validly promulgated in New York. Furthermore, paragraphs [103, 104, 105, 133, 137 and 138] of the Complaint should be stricken because they purport to apply the numeric standards of the DEC Annual Guideline Concentrations ("AGCs"), which have not been promulgated as regulations in New York or used as intended to establish permitted levels of emissions.

CONCLUSION

For all the foregoing reasons, Defendant's Motion to Dismiss Count One the Complaint should be granted in all respects, or, in the alternative, any allegation of a violation of numeric criteria that have not been promulgated under the New York Administrative Procedures Act should be stricken.

Dated: Hartford, Connecticut

November , 2022

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 17 of the Commercial Division Rules, I hereby certify that the foregoing Defendant's Memorandum of Law in Support of its Motion to Dismiss Count One of the Complaint contains [X – must be less than 7000] words as calculated by the word count feature on Microsoft Word, excluding the caption and signature block.

_____

James P. Ray