

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
SENECA ENERGY II, LLC	)	
SENECA, NEW YORK	)	ORDER RESPONDING TO THE
	)	FEBRUARY 8, 2016 REQUEST TO
PERMIT NUMBER: 8-3244-00040/00002	)	REOPEN THE TITLE V OPERATING PERMIT
	)	
ISSUED BY NEW YORK STATE	)	
DEPARTMENT OF ENVIRONMENTAL	)	
CONSERVATION	)	
_____	)	

**ORDER DENYING PETITION REQUESTING THAT THE ADMINISTRATOR  
REOPEN TITLE V OPERATING PERMIT**

This Order responds to issues raised in a petition to the U.S. Environmental Protection Agency (EPA) by the Finger Lakes Zero Waste Coalition (the Petitioner) dated February 8, 2016 (2016 Petition). The 2016 Petition requests that the EPA reopen the operating permit issued by the New York State Department of Environmental Conservation (NYSDEC) to Seneca Energy II, LLC (Seneca Energy) for the Ontario County Landfill Gas-to-Energy Facility (Seneca Energy Facility) located in Seneca, Ontario County, New York; Permit No. 8-3244-00040-00002 (2012 Final Permit). The operating permit was issued pursuant to title V of the Clean Air Act (CAA or Act), CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f (title V), and New York Environmental Conservation Law (E.C.L.) Article 19 § 19-0301 *et seq.*, E.C.L. Art. 70 *et seq.* *See also* 40 C.F.R. part 70. This operating permit is also referred to as a title V permit or part 70 permit.

**I. INTRODUCTION**

The 2016 Petition requests that the EPA “reopen” the title V permit on the basis that there is a rebuttable presumption of common control when one entity locates on another entity’s property and that the NYSDEC did not provide an adequate statement of basis for the permit conditions. Petition at 4. The specific issues raised in the 2016 Petition are described in detail in Section IV of this Order.

As an initial matter, the EPA notes that it is unclear from the 2016 Petition whether the Petitioner intended to file a petition for the EPA to *reopen* the title V permit or a petition for the EPA to *object* to the title V permit. The 2016 Petition itself is titled, “Petition Requesting That the Administrator *Reopen* the Title V Operating Permit for Seneca Energy II, LLC,” and repeatedly

requests for the EPA to “reopen” the permit.<sup>1</sup> However, the 2016 Petition does not cite any of the regulatory provisions concerning reopening of title V permits<sup>2</sup> and instead cites legal provisions concerning petitions to object.<sup>3</sup>

There are numerous differences between a petition to reopen and a petition to object.<sup>4</sup> One salient difference is that petitions to object are governed by CAA Section 505(b)(2). That provision provides that such petitions shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). In response to such a petition to object, the Act requires the Administrator to issue an objection if a petitioner demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act.<sup>5</sup>

That substantive distinction is immaterial in this case: The EPA has reviewed the 2016 Petition as a petition to reopen, and is denying the petition on the merits. However, even assuming for sake of argument that the Petitioner had intended to file a petition to object, the result would have been the same.<sup>6</sup>

## II. STANDARD FOR REOPENING

In the 1990 CAA Amendments, Congress required the EPA to establish minimum requirements for title V operating permit programs, including a requirement that permitting authorities have “adequate authority” to “terminate, modify, or revoke and reissue permits for cause . . . .”<sup>7</sup> The EPA’s implementing regulations establish that such “cause” encompasses the following four circumstances when a title V permit “shall be reopened and revised”:

- (i) Additional applicable requirements under the Act become applicable to a major part 70 source with a remaining permit term of 3 or more years [with some exceptions not relevant here].

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<sup>1</sup> See 2016 Petition at 1, 5 (emphasis added).

<sup>2</sup> See 40 C.F.R. § 70.7(f)–(g).

<sup>3</sup> See, e.g., 2016 Petition at 1 (citing CAA § 505(b)(2) and 40 C.F.R. § 70.8(d)). These citations include a discussion of the EPA’s “45-day review period,” see 2016 Petition at 2, which only applies in the context of petitions to object. See CAA § 505(b)(2) (providing “any person may petition the Administrator within 60 days after expiration of the 45-day review period” provided to the Administrator in CAA Section 505(b)(1)”).

<sup>4</sup> For example, while there is no express deadline for the EPA to respond to a petition to reopen, the EPA must grant or deny a petition to object within 60 days of its timely submission to the EPA.

<sup>5</sup> See CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2).

<sup>6</sup> See *infra* notes 12, 17 (and accompanying text), and 27.

<sup>7</sup> CAA section 502(b)(5)(D), 42 U.S.C. § 7661a(b)(5)(D).

- (ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. [\* \* \*]
- (iii) The permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.
- (iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.<sup>8</sup>

The process by which the EPA may initiate the reopening process for such a title V permit is explained at 40 C.F.R. § 70.7(g)(1): “If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to [40 C.F.R. § 70.7(f)], the Administrator will notify the permitting authority and the permittee of such finding in writing.”<sup>9</sup>

Like other provisions found in EPA-administered statutes and regulations, this two-step regulatory framework includes a “mandatory clause” requiring EPA action if, and only if, the Administrator “makes a specific threshold determination . . . that a substantive standard has been satisfied.”<sup>10</sup> In the context of a petition to reopen, the threshold determination is the Administrator’s “find[ing] that cause exists to terminate, modify, or revoke and reissue a permit” pursuant to 40 C.F.R. § 70.7(f). If, and only if, the Administrator makes that finding, the EPA “will notify” the relevant entities to initiate the reopening process.

In light of the discretionary threshold finding applicable to reopenings for cause by the EPA, a petition to reopen a title V permit should present evidence (*e.g.*, factual information, citation, analysis) explaining why there is cause to reopen the title V permit pursuant to 40 C.F.R. § 70.7(f).<sup>11</sup>

In this instance, as described below in Section IV, the Petitioner has not presented sufficient

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<sup>8</sup> 40 C.F.R. § 70.7(f)(1)(i)–(iv); *see* 57 Fed. Reg. 32250, 32256 (July 21, 1992) (noting that these provisions define “cause” as that term appears in CAA section 502(b)(5)(D)).

<sup>9</sup> *See* CAA section 505(e), 42 U.S.C. § 7661a(e).

<sup>10</sup> *See, e.g., Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 242–43 (5th Cir. 2015) (discussing somewhat similar regulatory framework under the Clean Water Act, but in a rulemaking context).

<sup>11</sup> In determining whether to grant a petition to reopen, nothing in the CAA requires the EPA to conduct its own independent studies, assessments, or otherwise to seek out facts not presented in the petition itself. *Cf. Consumer Fed’n of Am. v. U.S. Consumer Prod. Safety Comm’n*, 883 F.2d 1073, 1078 (D.C. Cir. 1989) (absent a statutory mandate, agencies are not required to conduct independent analyses when determining whether to commence a rulemaking in response to a petition).

evidence that the title V permit fails to comply with the CAA, much less—more specifically—that cause to reopen exists pursuant to 40 C.F.R. § 70.7(f).

### III. BACKGROUND

On June 29, 2015, the EPA partially granted a petition to object (2012 Petition) from the Petitioner, Finger Lakes Zero Waste Coalition, to Seneca Energy’s 2012 proposed title V renewal permit issued by the NYSDEC. *See In the Matter of Seneca Energy, II, LLC*, Order on Petition No. II-2012-01, (June 29, 2015) (2015 Seneca Energy Order or Order) at 14. The central assertion of the 2012 Petition was that the Seneca Energy Facility and the Ontario County Landfill were under common control, were thus a single major source, and should have their emissions combined for CAA permitting purposes. 2012 Petition at 3. In the 2015 Seneca Energy Order, the EPA determined that the NYSDEC’s record was inadequate to support its conclusion that the Seneca Energy Facility and the landfill were not under common control. 2015 Seneca Energy Order at 15-16. The EPA directed the NYSDEC to explain, on the record, what case-specific facts and factors it considered as part of its source determination analysis regarding the Seneca Energy Facility and the landfill.

On October 25, 2015, Thomas S. Berkman, Acting Deputy Commissioner and General Counsel, Office of General Counsel, NYSDEC, submitted a letter to EPA Administrator McCarthy titled “Title V Operating Permit in the Matter of Seneca Energy II, LLC, Seneca, New York, Permit Number 8-3244-00040/00002,” responding to the EPA’s 2015 Seneca Energy Order. The letter contained an attachment entitled, “Rationale for Determining that the Ontario County Landfill and the Seneca Energy II, LLC Ontario County Landfill Gas to Energy Facility are not a Single Major Stationary Source or Major Facility” (2015 NYSDEC Rationale).

On February 8, 2016, the EPA received the 2016 Petition requesting the agency to reopen the Seneca Energy title V permit.

### IV. EPA’S DETERMINATION

The EPA denies the Petitioner’s request to reopen the title V permit. The Petitioner has not presented sufficient evidence to support its claim that the permit does not comply with CAA requirements.<sup>12</sup> Additionally, and independently, the Petitioner has not articulated why any alleged noncompliance qualifies as cause to reopen the permit pursuant to 40 C.F.R. § 70.7(f)<sup>13</sup> or the identical criteria outlined in Item K of the 2012 Final Permit,<sup>14</sup> or even cited any such

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<sup>12</sup> Insofar as the 2016 Petition was intended as a petition to *object*, the EPA denies the 2016 Petition on a similar basis: For the same reasons articulated below, the Petitioner did not demonstrate that the permit does not comply with CAA requirements. *See, e.g., New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316 (2d Cir. 2003).

<sup>13</sup> New York’s analogous regulatory provision may be found at 6 NYCRR 201-6.4(i).

<sup>14</sup> Pursuant to the EPA’s and New York’s title V regulations, the permit itself specifies that cause exists to reopen it if, *inter alia*, (1) “The . . . [A]dministrator [of the EPA] determines that the permit contains a material mistake or that inaccurate statements were made in establishing the

provision. The Petitioner has not explained, for example, why any aspect of the permit would constitute a “material mistake” with regard to the establishment of emission standards or other terms or conditions of the permit,<sup>15</sup> or why the permit “must” be revised or reopened to assure compliance with applicable requirements.<sup>16</sup>

The Petitioner’s specific bases for requesting that Seneca Energy’s permit be reopened, and the EPA’s analysis of those bases, are discussed below. Insofar as the Petition was intended to be a petition to *object*, the EPA denies the Petition for the same reasons, which amount to a failure to demonstrate that the permit does not comply with CAA requirements.<sup>17</sup>

## A. Rebuttable Presumption

The Petitioner contends that the NYSDEC’s response “failed to respond as directed in the EPA Order.” 2016 Petition at 4. In support of that contention, the Petitioner cites the 2015 Seneca Energy Order’s discussion of a “rebuttable presumption” of common control for co-located facilities. Specifically, the Petitioner claims that, when conducting a common control analysis, the NYSDEC was required to apply a rebuttable presumption discussed in the 2015 Seneca Energy Order and in the NYSDEC’s Declaratory Ruling 19-19. *See id.* However, as discussed below, neither the 2015 Seneca Energy Order nor the NYSDEC’s Declaratory Ruling 19-19 requires the state to apply a rebuttable presumption when determining common control for co-located facilities.

### 1. EPA’s 2015 Seneca Energy Order

According to the Petitioner, the EPA’s 2015 Seneca Energy Order, “made clear that there is [sic] ‘rebuttable presumption [of common control] when one entity locates on another entity’s property.’” 2016 Petition at 4 (quoting 2015 Seneca Energy Order at 10).

The Petitioner quotes the Order out of context. The Order makes clear that, “*when the EPA conducts a common control analysis, the Agency employs a rebuttable presumption when one entity locates on another entity’s property.*”<sup>18</sup> However, the Order did not assert that *state* permitting authorities conducting case-by-case common control analyses must employ the same rebuttable presumption. Rather, the Order stated that state, local, or tribal permitting authorities act unreasonably when they do not at least consider facilities’ co-location as a “key consideration

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emissions standards or other terms or conditions of the permit,” or (2) “The . . . [A]dministrator [of the EPA] determines that the title V permit must be revised or reopened to assure compliance with applicable requirements.” 2012 Final Permit, General Permittee Obligation Item K, Air Pollution Control Permit Conditions at p. 6–7.

<sup>15</sup> 40 C.F.R. § 70.7(f)(1)(iii).

<sup>16</sup> *Id.* § 70.7(f)(1)(iv).

<sup>17</sup> *See* 2015 Seneca Energy Order at 3–5 (discussing the scope of, and legal foundation for, a petitioner’s demonstration burden in the context of petitions seeking EPA objection to a title V permit).

<sup>18</sup> 2015 Seneca Energy Order at 10 (emphasis added).

in determining whether a common control relationship exists.”<sup>19</sup> Thus, for example, entirely ignoring such co-location would be unreasonable given how often co-location signifies common control.

The Order did not assert that state permitting authorities must adopt the same presumptions that the EPA does, or that state permitting authorities must necessarily reach the same conclusion on common control that the EPA would if the agency were the permitting authority. To the contrary, the Order noted that state permitting authorities have “substantial discretion” in many permitting decisions, and that in some case-specific permitting decisions, “the EPA generally will not substitute its judgment for that of New York.”<sup>20</sup> “The DEC, as the relevant permitting authority, may exercise reasonable discretion when making common control determinations in accordance with applicable legal requirements.”<sup>21</sup>

The EPA presumes that co-located facilities are under common control when it conducts its own common control analysis because the agency has found that, generally speaking, it is rare for one facility to locate on another’s property in the absence of a common control relationship.<sup>22</sup> Because the EPA approaches common control issues on a case-by-case basis, this sensible presumption helps to provide a measure of predictability regarding how the agency proceeds with analyzing common control for co-located facilities. Facility owners and operators know that the EPA will begin by presuming the existence of a common control relationship, and that the agency will shift the burden to the facilities themselves to offer sufficient facts to overcome that sensible presumption.

Like the EPA, states often must make common control determinations when they are the relevant permitting authority. However, in making those determinations, state permitting authorities are not required to adopt the same rebuttable presumption that the EPA does when the agency conducts its own determinations.

When a permitting action concerns co-located facilities that meet the other criteria for source aggregation, the state, local, or tribal authority is required to determine whether the facilities are “under common control,” as that phrase is used in the CAA and reasonably interpreted by the EPA. Neither the CAA itself nor the EPA’s interpretation of “under common control” requires the state to adopt the same rebuttable presumption regarding common control that the EPA applies when the agency is the permitting authority. The EPA’s presumption, while sensible and predictable, is merely a logical starting point for when the EPA itself goes about making common control determinations for co-located facilities. It is not an interpretation binding on

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<sup>19</sup> *Id.*; *see id.* at 7 (discussing how and why the EPA applies the rebuttable presumption as part of “EPA’s approach” when making “the Agency’s determinations of common control”).

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 17.

<sup>22</sup> *See, e.g.*, Letter from William A. Spratlin, Air, RCRA, and Toxics Div. Dir., U.S. EPA Region 7, to Peter R. Hamlin, Air Quality Bureau Chief, Iowa Department of Natural Resources (Sept. 18, 1995), available at <https://www.epa.gov/sites/production/files/2015-08/documents/control.pdf>.

state, local, or tribal permitting authorities regarding what it means for two facilities to be “under common control.” States are not required to apply a rebuttable presumption of common control for co-located facilities, although they (like the EPA) may find that it is a useful place to begin the analysis.

Simply put, neither the NYSDEC nor any other state, local, or tribal permitting authority is required to presume that co-located facilities are under common control. The 2015 Seneca Energy Order did not state otherwise, and the Petitioner has incorrectly asserted that it did.

## **2. NYSDEC’s Declaratory Ruling 19-19<sup>23</sup>**

Regardless of whether the 2015 Seneca Energy Order compelled the NYSDEC to apply a rebuttable presumption of common control (which it did not), the Petitioner further claims that, “[t]he DEC Commissioner’s Declaratory Ruling 19-19 adopts the rebuttable presumption rule.” Petition at 4 (citing the NYSDEC’s Declaratory Ruling 19-19).

This assertion is also incorrect. Although the NYSDEC’s Declaratory Ruling 19-19 mentions the rebuttable presumption in reviewing what it calls “EPA’s informal guidance documents and determination letters,” the Ruling expressly says that although the NYSDEC staff “may be guided” by those materials, they “are not obligated to rely exclusively on any particular document, simplifying test, or factor *or presumption* therein.”<sup>24</sup> In case there was any question, the NYSDEC provided this plain reading of the Declaratory Ruling when responding to the EPA’s 2015 Seneca Energy Order: “Although DR 19-19 discusses various EPA informal guidance letters, [it] does not adopt any particular EPA informal guidance to be required guidance for DEC staff.”<sup>25</sup>

The Petitioner points to no other authority requiring that the NYSDEC employ a rebuttable presumption of common control for co-located facilities. Accordingly, the Petitioner is incorrect to rely on that rebuttable presumption as a basis for contending that that the NYSDEC’s response improperly “failed to respond as directed in the EPA Order.” Petition at 4.

## **B. Facts and Factors**

The Petitioner also reiterates several “facts and factors” from its initial 2012 Petition, which it claims are “indicative of a common control relationship” between the facilities. 2016 Petition at 3. The 2012 Petition, however, was filed before the NYSDEC had extensively addressed the common control relationship between the facilities in the 2015 NYSDEC Rationale. With the

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<sup>23</sup> NYSDEC, *In the Matter of the Petition of Seneca Meadow, Inc. for a Declaratory Ruling* (Sept. 9, 2011), available <http://www.dec.ny.gov/regulations/77083.html>

<sup>24</sup> *Id.* (emphasis added).

<sup>25</sup> NYSDEC Rationale at 4. Although the NYSDEC acknowledged that it has no record of having employed the EPA’s rebuttable presumption as a starting place when previously ascertaining common control and does not appear to have subsequently done so in response to the EPA’s 2015 Seneca Energy Order, the state noted that even if it had employed that presumption, “the resulting DEC source determination would not change.” *Id.* at 6 n.5.

exception of the NYSDEC's purported failure to apply a presumption of common control (discussed above), the 2016 Petition never addresses the substance of the NYSDEC's supplemental analysis.<sup>26</sup>

The 2016 Petition does not address the substance of the 2015 NYSDEC Rationale. Therefore, the Petitioner has not pointed to any factual or legal deficiency in the state's reasoning. The Petitioner did not address the basis of the permitting authority's final decision, in particular its final reasoning.<sup>27</sup> Particularly in circumstances such as common control determinations, which often involve "difficult factual determination[s],"<sup>28</sup> it will generally be important for a petition to reopen to address the state's reasoning in order to present a convincing case that the underlying title V permit is not in compliance with CAA requirements. In this instance, that the Petitioner did not address the state's final reasoning undermines its assertion that the 2012 Final Permit is infirm and, in any event, does not help to advance any argument that an alleged infirmity constitutes cause for the EPA to reopen that permit.

### C. Statement of Basis

To the extent that the Petitioner raises independent concerns regarding the NYSDEC's statement of basis, required by 40 C.F.R. § 70.7(a)(5), the Petitioner has not clearly articulated what may be "defective" about that statement of basis. *See* Petition at 4. The Petitioner could possibly be asserting that the 2015 Seneca Energy Order effectively "conclude[d] that NYSDEC failed to satisfy 40 C.F.R. § 70.7(a)(5)," the requirement to include a statement of basis. *Id.* If so, this is incorrect; nothing in the 2015 Seneca Energy Order directed NYSDEC to update its statement of basis, and the EPA's directive to supplement the permit record did not require updating the statement of basis itself. For example, supplementation could involve amending the response to comments document, or merely including an entirely new document in the record. In this case, NYSDEC's response was a direct answer to the EPA's Order, which directed the state to

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<sup>26</sup> For example, while the 2016 Petition notes the fact that the facilities "share equally in tax credits granted to" Seneca Energy II, LLC, *see* Petition at 3, the Petition does not address the NYSDEC's characterization of those tax credits with respect to common control. *See* 2015 NYSDEC Rationale at 10. As another example, while the 2016 Petition notes the fact that Seneca Energy employees have "access to the landfill property to make emergency repairs when the landfill is unmanned," *see* Petition at 3, the Petition does not address the NYSDEC's contention that, *inter alia*, this type of relationship is not indicative of a "common workforce." *See* 2015 NYSDEC Rationale at 7.

<sup>27</sup> Insofar as the Petition was intended as a petition to object, this failure to address the state's reasoning constitutes an independent reason that the Petitioner has not met its demonstration burden for such a petition, and is consequently denied. *See, e.g., MacClarence v. EPA*, 596 F.3d 1123, 1132–33 (9th Cir. 2010); *In the Matter of Noranda Alumina. LLC*, Order on Petition No. VI-2011-04 (Dec. 14, 2012) (Noranda Order) at 20–21 (denying title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV- 2010-9 (June 22, 2012) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred).

<sup>28</sup> 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980).



supplement the record for the 2012 Final Permit. Accordingly, the 2016 Petition is denied as to this issue and, to the extent Petitioner intended to make a different argument, the 2016 Petition is denied for not being sufficiently clear. In the same paragraph, the Petitioner also says that the “defective” statement of basis “fails to rebut the presumption” of common control between these two facilities. *Id.* However, as discussed above, the Petitioner is incorrect that the NYSDEC was required to apply the rebuttable presumption in the first place. Accordingly, the 2016 Petition is denied as to this issue.

Overall, as discussed above, none of the Petitioner’s arguments suffice to show that cause exists for the EPA to reopen the 2012 Final Permit. The Petitioner has not presented sufficient evidence, or even alleged, that the permit contains a material mistake related to emission standards or other terms or conditions of the permit, or that the permit must be revised or reopened to assure compliance with applicable requirements. *See* 2012 Final Permit Item K; 40 C.F.R. § 70.7(f)(1); 6 NYCRR 201-6.4(i). Moreover, the information in the permit record does not support a determination that cause exists to reopen the 2012 Final Permit, on these bases or on any other basis.

**V. CONCLUSION**

For the reasons set forth above, I hereby deny the 2016 Petition.

Dated: \_\_\_\_\_

*July 29, 2016*

  
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Gina McCarthy  
Administrator