

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
)	
SENECA ENERGY II, LLC)	
SENECA FALLS, SENECA COUNTY, NEW YORK)	PETITION NUMBER II-2013-01
)	
PERMIT No. 8-4532-00075-00029)	ORDER RESPONDING TO THE
)	PETITIONER’S REQUESTS THAT THE
ISSUED BY THE NEW YORK STATE)	ADMINISTRATOR OBJECT TO THE
DEPARTMENT OF ENVIRONMENTAL)	ISSUANCE OF A STATE OPERATING
CONSERVATION)	PERMIT
)	

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

This Order responds to issues raised in a petition to the U.S. Environmental Protection Agency (EPA) by the Concerned Citizens of Seneca County, Inc. (the Petitioner), dated September 9, 2013 (the Petition), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petitioner requests that the EPA object to the operating permit issued by the New York State Department of Environmental Conservation (NYSDEC) to Seneca Energy II, LLC (Seneca Energy) for the Seneca Energy Landfill Gas-to-Energy Facility (the Energy Facility) located in Seneca Falls, Seneca County, New York; Permit No. 8-4532-00075-00029 (Energy Facility title V permit). The operating permit was issued pursuant to title V of the CAA, CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, and New York Environmental Conservation Law (E.C.L.) Article 19 § 19-0301 *et seq.*, E.C.L. Art. 70 *et seq.* See also Code of Federal Regulations (C.F.R.) part 70. This operating permit is also referred to as a title V permit or part 70 permit.

Based on review of the Petition and other relevant materials, including the Final Permit, permit record, and relevant statutory and regulatory authorities, and as explained below, the EPA denies the Petition requesting that the EPA object to the Energy Facility’s title V Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

The CAA § 502(d)(1), 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA. The EPA granted full approval to New York’s title V (part 70) operating permit program on February 5, 2002. 67 *Fed. Reg.* 5216. This program is codified in the E.C.L. Art. 19 § 19-0311, 6 New York

Codes, Rules, and Regulations (N.Y.C.R.R.) § 201-6. All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable state implementation plan (SIP). CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting and other requirements to assure sources' compliance. *57 Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to “enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

Applicable requirements for a new major stationary source or for a major modification to a major stationary source include the requirement to obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. The NSR program is comprised of two core preconstruction permit programs for major sources. Part C of Title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to areas of the country, such as Seneca Falls in Seneca County, New York, that are designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. Part D of Title I of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment with the NAAQS. At issue in this order is the PSD part of the NSR program, which requires a major stationary source in an attainment area to obtain a PSD permit before beginning construction of a new facility or undertaking certain modifications. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1). The analysis under the PSD program must address two primary and fundamental elements (among other requirements) before the permitting authority may issue a permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to best available control technology for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); *see also* 6 N.Y.C.R.R. Part 231.

The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a SIP. The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA has approved the state of New York's PSD SIP. *See 75 Fed. Reg.* 70140 (November 17, 2010) and 40 C.F.R. §§ 52.1670 (discussing approval of PSD provisions in cite to PSD SIP). As the NYSDEC administers a SIP-approved PSD program, the applicable requirements of the Act for new major sources or major modifications include the requirement to comply with PSD requirements under the New York SIP. *See, e.g.*, 40 C.F.R. § 70.2 (defining “Applicable

requirements”).¹ In this case, the “applicable requirements” include New York’s PSD provisions contained in 6 N.Y.C.R.R. Part 231, as approved by the EPA into New York’s SIP. As the EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, such requirements include that the permitting authority (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. *See, e.g., In the Matter of Wisconsin Power and Light, Columbia Generating Station*, Order on Petition No. V-2008-01 (October 8, 2009) at 8. As the permitting authority for New York’s SIP-approved PSD program, the NYSDEC has substantial discretion in issuing PSD permits. Given this discretion, in reviewing a PSD permitting decision, the EPA generally will not substitute its own judgment for that of New York. Rather, consistent with the decision in *Alaska Dep’t of Env’tl Conservation v. EPA*, 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state’s PSD permitting decision, the EPA generally will look to see whether the petitioner has shown that the state did not comply with its SIP-approved regulations governing PSD permitting, or whether the state’s exercise of discretion under such regulations was unreasonable or arbitrary. *See, e.g., In re Louisville Gas and Electric Company*, Order on Petition No. IV-2008-3 (August 12, 2009); *In re East Kentucky Power Cooperative, Inc. Hugh L. Spurlock Generating Station*, Order on Petition No. IV-2006-4 (August 30, 2007); *In re Pacific Coast Building Products, Inc.* (Order on Petition) (December 10, 1999); *In re Roosevelt Regional Landfill Regional Disposal Company* (Order on Petition) (May 4, 1999).

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to the EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a) and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if the EPA determines that the permit is not in compliance with applicable requirements of the CAA. CAA §§ 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA’s 45-day review period, to object to the permit.

Such a petition 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

¹ “Applicable requirements” include “(1) [a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] part 52; (2) [a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.” 40 C.F.R. § 70.2. All sources subject to the title V regulations must “have a permit to operate that assures compliance by the source with all applicable requirements.” *See id.* § 70.1(b).

such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, 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. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. In evaluating a petitioner’s claims, the EPA considers, as appropriate, the adequacy of the permitting authority’s rationale in the permitting record, including the response to comments (RTC) document.

The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a “discretionary component,” to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 (“[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements.”). Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made”) (emphasis added); *NYPIRG*, 321 F.3d at 334 (“§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated.”) (emphasis added); *Sierra Club v. Johnson*, 541 F.3d at 1265 (“Congress’s use of the word ‘shall’ ... plainly mandates an objection *whenever* a petitioner demonstrates noncompliance.”) (emphasis added). When courts review the EPA’s interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. A more detailed discussion of the petitioner demonstration burden can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013) (*Nucor II Order*) at 4–7.

The EPA has looked at a number of criteria in determining whether the petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning (including the RTC), where these

documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) (*Noranda Order*) at 20–21 (denying title V petition issue where petitioners did not respond to state’s explanation in the RTC or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state’s RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner’s objection, contrary to Congress’ express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (September 21, 2011) (*Murphy Oil Order*) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 (January 15, 2013) (*Luminant Sandow Order*) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (April 20, 2007) (*BP Order*) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (March 15, 2005) (*Chevron Order*) at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011) at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012) at 6–7, 10–11, 13–14.

C. Overview of Title V and PSD Single Source Determinations

1. Single Source Determination

A permitting authority must take into account the emissions from all parts of a single source when determining the applicable requirements and conditions for operation of that source. Fundamental to this process is the determination of which emission units are actually part of that “single source.” The EPA has promulgated regulatory definitions of “major source” and “stationary source” that clarify when emission units are a single source.

The title V regulations define “major source” to mean “any stationary source (*or any group of stationary sources* that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping” and that meet emissions thresholds that would qualify as a “major source” or “major stationary source” under certain other provisions of the CAA.² 40

² The definitions of “major stationary source” corresponding to section 302 and Title I, part D require facilities to be (a) located on one or more contiguous or adjacent properties, (b) “under common control,” and (c) share the same

C.F.R. § 70.2 (citing 42 U.S.C. §§ 7412, 7603(j), 7501–7509a) (emphasis added); *see* 42 U.S.C. § 7661(2); 6 N.Y.C.R.R. Parts 200.1(cd), 201-2.1(b)(21). The EPA’s applicable PSD regulations define “stationary source” as “any building, structure, facility, or installation, which emits or may emit a regulated NSR [New Source Review] pollutant.” 40 C.F.R. § 51.166(b)(5). The PSD regulations further define “building, structure, facility, or installation” as “*all of the pollutant-emitting activities* which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). . . .” *Id.* § 51.166(b)(6) (emphasis added).

Accordingly, for facilities to constitute a single stationary source under the PSD and the title V programs of the CAA, the facilities must (1) be located on one or more contiguous or adjacent properties; (2) share the same two-digit (major group) Standard Industrial Classification (SIC) code; and (3) be under common control of the same person (or persons under common control). *See* 40 C.F.R. § 70.2; *id.* § 51.166(b)(5), (6); *see also id.* § 71.2; *id.* § 51.165(a)(1)(i), (ii); *id.* § 52.21(b)(5), (6). In the present case involving the Seneca Energy Facility Title V Permit, the third requirement, common control, is discussed both in the title V petition and in the state’s response to comments. Additional detail regarding the third requirement is provided below.

2. Common Control

a. *Overview of Federal Regulations and Policy*

Neither the CAA nor the EPA’s title V or PSD regulations define the phrase “common control.” In an early NSR rulemaking, the EPA rejected a simplified test of control based on “some specified voting share.”³ The EPA explained that a case-by-case approach was the appropriate means of determining common control because “[c]ontrol can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity.”⁴ In that rulemaking, the EPA explained that in making determinations of common control on a case-by-case basis

the Agency will be guided by the general definition of control used by the Securities and Exchange Commission...[in which] control “means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.”⁵

two-digit (major group) SIC code (or for one facility to be considered a support facility to the other) (*see* 45 *Fed. Reg.* 52676, 52695 (August 7, 1980)), while the definition of “major source” corresponding to CAA § 112 does not include this last requirement. *Compare* 40 C.F.R. §§ 70.2, 71.2 *with* 40 C.F.R. § 63.2; *see Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351, 1356 (D.C. Cir. 1995).

³ 45 *Fed. Reg.* 59874, 59878 (September 11, 1980).

⁴ *Id.*

⁵ *Id.* (quoting 17 C.F.R. § 210.1-02(g) (1980)). This definition is echoed in other Securities and Exchange Commission regulations, which define “control” and “under common control with” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 230.405; *see also id.* § 240.12b-2.

The EPA discussed the term “common control” in a September 18, 1995, letter from William A. Spratlin, Director of EPA Region 7’s Air, Resource Conservation and Recovery Act (RCRA) and Toxics Division, to Peter R. Hamlin, the Air Quality Bureau Chief of Iowa’s Department of Natural Resources (Spratlin Letter).⁶ The Spratlin Letter identified a “not exhaustive” list of indicators and questions that the EPA has found to be a useful “screening tool” for determining whether facilities are under common control for purposes of the CAA.

As articulated in the Spratlin Letter, when the EPA conducts a common control determination, the agency presumes that a common control relationship exists when one company locates on another’s property. The EPA reasonably presumes that these so-called “companion” facilities are under common control because companies rarely locate on each other’s property in the absence of a common control relationship.⁷ The EPA’s approach to addressing companion facilities is to request information from the facilities themselves that can illuminate their relationship and that may be sufficient to overcome the presumption of common control. If the companion facilities do not provide information that rebuts this presumption, then the EPA treats the facilities as being under common control. This presumption, while sensible and predictable, is merely a logical starting point for when the EPA itself makes common control determinations for co-located facilities. It is not an interpretation binding on 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 a state (like the EPA) may find that it is a useful place to begin the analysis.⁸

Overall, the agency’s determinations of common control are made on a case-by-case basis taking into account the specific facts of a case, and are based on regulatory background information, as well as EPA guidance documents and precedent.

The EPA has generally followed the analytical approach set forth in the Spratlin Letter when it conducts its own common control determinations, including situations that involve “companion” landfills and gas-to-energy facilities.⁹ Several examples involving landfills and “companion” Landfill Gas-to-Energy (LFGTE) facilities illustrate the EPA’s approach to addressing common control for “companion” facilities.

⁶ Letter from William A. Spratlin, Air, RCRA, and Toxics Division Director, U.S. EPA Region 7, to Peter R. Hamlin, Air Quality Bureau Chief, Iowa Dep’t of Natural Resources (September 18, 1995) (hereinafter “Spratlin Letter”), available at <https://www.epa.gov/sites/production/files/2015-08/documents/control.pdf>.

⁷ See Spratlin Letter at 1 (“Typically, companies don’t just locate on another’s property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another. Therefore, we presume that one company locating on another’s land establishes a ‘control’ relationship.”).

⁸ See 2016 Seneca Energy Order at 6–7.

⁹ See, e.g., Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, Commissioner, New York State Department of Environmental Conservation, “Re: EPA’s Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1” (July 8, 2004), available at <https://www.epa.gov/sites/production/files/2015-08/documents/alturi.pdf>.

One example involves the Houston County landfill, PowerSecure, and Flint Electric Membership Cooperative (FEMC).¹⁰ In that case, the state of Georgia requested that the EPA make a common control determination concerning an LFGTE facility and a “companion” landfill.¹¹ The EPA’s response began by noting, “[b]ecause Georgia’s prevention of deterioration (PSD) and title V programs have been approved by the EPA, it is the State’s responsibility to ensure that source determinations are made consistent with minimum program requirements.”¹² Accordingly, the EPA explained that the analysis contained in its response letter “is provided as guidance to assist the permitting authority in this applicability determination, is based on the information provided to us, and does not constitute a final agency action.”¹³

After reviewing the facts before the agency, the EPA stated that it “agrees with [Georgia] that it is appropriate to consider the facilities at the site to be under common control”¹⁴ The EPA noted that PowerSecure (under subcontract to FEMC) had located on Houston County landfill’s property, and thus the EPA presumed the existence of a common control relationship.¹⁵ In addition to the factor that presumes common control when one entity locates on another entity’s property, the EPA noted additional case-specific “factors”¹⁶ in the relevant landfill gas purchase and sales agreement that supported a determination of common control between the three entities:¹⁷

- (1) FEMC, which purchases the landfill gas, is not permitted to sell, redirect, transport or market the landfill gas, or any portion thereof to any third party;
- (2) FEMC is only permitted to use the landfill gas for electricity generation at the processing site; and
- (3) The landfill gas purchase and sales agreement provides for specific performance; namely, that each party can require that the other party comply with the terms and conditions of the agreement as written.

In the PowerSecure case, the EPA explained that the factors described above supported a determination of common control for the entities, but that this list of factors was not exhaustive nor intended to be exhaustive. Rather, those factors were specifically identified in order to further illustrate the common control relationship that exists between the entities.¹⁸

¹⁰ See Letter from Gregg M. Worley, Air Permits Section Chief, U.S. EPA Region 4, to James Capp, Air Prot. Branch Chief, Environmental. Protection Division, Georgia Department of Natural Resources. (December 16, 2011) (hereinafter “PowerSecure Letter”), available at <https://www.epa.gov/sites/production/files/2015-07/documents/ps2011.pdf>.

¹¹ PowerSecure Letter at 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2–3.

¹⁶ The term “factor” here refers to a feature of the relationship between Houston County landfill, PowerSecure, and FEMC that the EPA found indicative of a common control relationship. See *id.* at 3 n.4.

¹⁷ See *id.* at 3.

¹⁸ See *id.* at 3.

A second example involves the Maplewood landfill and a “companion” LFGTE facility of Industrial Power Generating Corporation (INGENCO).¹⁹ In that case, the Commonwealth of Virginia requested the EPA’s opinion on whether the facilities were under common control. As in the PowerSecure case, the EPA noted, “Virginia has been granted full approval of the PSD and Title V operating permits programs,” and as the permitting authority “must ultimately determine whether Maplewood and INGENCO are under common control for purposes of implementing [its] PSD and Title V programs.”²⁰

After reviewing the facts before the agency, the EPA stated, “if EPA were making the determination, we would find . . . that Maplewood and INGENCO are not under common control.”²¹ The EPA reached its conclusion based on the following features of the relationship between the parties. First, the EPA noted that the INGENCO facility would be located on property owned by the Maplewood, and thus the EPA presumed the existence of a common control relationship.²² Unlike in the PowerSecure case, however, the EPA found that there were sufficient case-specific facts and circumstances to rebut that presumption, specifically that:

- (1) The engines at the INGENCO facility were to run on various types of liquid fuel, including diesel, and were supplemented by Maplewood’s landfill gas. Indeed, the landfill was incapable of satisfying all of INGENCO’s fuel needs.
- (2) Although all of Maplewood’s landfill gas was to be purchased by INGENCO, both facilities were able to operate without each other. In fact, if either facility shut down, the other could continue operating at full capacity.
- (3) INGENCO was obligated to buy the gas produced by the Maplewood landfill, but could then burn it, sell it, or return it to Maplewood for flaring. INGENCO was to control the valve that shunted the landfill gas to the electricity generating engines or to Maplewood’s flare.
- (4) There was a clear division of responsibility between the entities, e.g., INGENCO was responsible for all capital improvements on the leased property to create the electricity generating plant, and Maplewood landfill owned and operated the landfill gas collection system and flare.
- (5) Maplewood and INGENCO had no financial interest in one another.
- (6) The companies had no common employees, officers, or members of their respective governing boards, payroll activities, employee benefits, health plans, or other administrative functions.

¹⁹ See Letter from Judith M. Katz, Air Protection Division Director, U.S. EPA Region 3, to Gary E. Graham, Environmental Engineer, Virginia Department of Environmental Quality, “Re: Common Control for Maplewood landfill, also known as Amelia landfill, and Industrial Power Generating Corporation” (May 1, 2002) (hereinafter “Maplewood/INGENCO Letter”), available at <https://www.epa.gov/sites/production/files/2015-08/documents/20020501.pdf><http://www.epa.gov/region7/air/title5/t5memos/20020501.pdf>.

²⁰ Maplewood/INGENCO Letter at 4.

²¹ *Id.*

²² *Id.* at 2.

- (7) Neither facility had control over the other facility's compliance responsibilities. The facilities did not share pollution control equipment. Moreover, the purpose of the relevant purchase agreement, as the agency understood it, was to allow INGENCO to purchase landfill gas to either fuel its engines or to sell to other purchasers, not to destroy nonmethane organic compounds for the benefit of the landfill.
- (8) At the time of the determination, Maplewood received its power through a local power utility and there was no indication that it would receive its power directly from INGENCO. Additionally, there were no arrangements for Maplewood to accept INGENCO's municipal solid waste.

Maplewood/INGENCO Letter at 2–4. The factors in the case of Maplewood/INGENCO listed above are not exhaustive, but rather are some of the factors that influenced the EPA's assessment of the relationship between Maplewood and INGENCO.

The summaries of the above letters help to illustrate the agency's interpretation of the common control element for source determinations. The EPA interprets the CAA and its implementing regulations to provide for this type of case-by-case analysis in evaluating the common control prong of the single source determination for title V and PSD purposes. Permitting authorities operating under SIP-approved and title V-approved programs are likewise expected to provide a reasoned explanation of their source determinations in the permitting record that is consistent with the CAA. As described and illustrated above, when the EPA conducts a common control analysis, the agency employs a rebuttable presumption when one entity locates on another entity's property. The EPA employs this presumption because it is rare that a facility locates on another's property without being under common control. Accordingly, state permitting authorities act unreasonably when they do not at least consider the location of one entity on another entity's property as a key consideration in determining whether a common control relationship exists.

b. *New York Regulations*

Although neither the New York E.C.L. nor its implementing regulations under 6 N.Y.C.R.R. Part 201-6 define the state's process for conducting a common control analysis, on September 9, 2011, the NYSDEC issued the Declaratory Ruling 19-19 ("Declaratory Ruling"), which explained factors the NYSDEC would consider in making a source determination. *See* Declaratory Ruling at 8–13. Under the New York State Administrative Procedure Act, a "declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court."²³ According to the Declaratory Ruling, the NYSDEC follows a case-by-case approach in determining whether two or more nominally separate facilities are under common control. The Declaratory Ruling states, "The following is a summary of notable EPA informal guidance documents and determinations letters which Department staff may consider when making common source determinations." The informal guidance documents and determination letters

²³ N.Y. S.A.P.A. § 204.1, 6 N.Y.C.R.R. Part 619.

cited in the Declaratory Ruling included the 1980 rule addressing common control;²⁴ the Spratlin Letter; a generally applicable four-factor approach to conducting source determinations; the “Werner Letter” providing guidance to NYSDEC on source determinations for landfills and companion LFGTE facilities;²⁵ and a series of common control determination letters, including the Maplewood/INGENCO Letter.²⁶ The Declaratory Ruling concludes,

[t]he determination of whether two or more facilities are ‘under common control’ will continue to be made on a case-by-case basis. This determination should be made at the time a prospective permittee applies for a permit to ensure that all emissions from a single source are taken into account when determining what applicable requirements and permit conditions should apply to the source and included in its permit. In utilizing the case-by-case approach, Department staff may be guided by EPA’s informal guidance documents and determination letters, but are not obligated to rely exclusively on any particular document, simplifying test, or factor or presumption therein.

For practical reasons, Department staff should first look to see whether there is common ownership between the facilities, including a review of any parents and subsidiaries. If common ownership exists, then “common control” is established. If no common ownership exists, then staff should review the facts and circumstances specific to the permit application at hand, and apply the various review criteria developed over the years.²⁷

Although 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.”²⁸ The NYSDEC confirmed this plain reading of the Declaratory Ruling in its response to the EPA’s 2015 Order on the Seneca Energy II, LLC facility in Seneca, New York²⁹: “Although [Declaratory Ruling] 19-19 discusses various EPA informal guidance letters, [it] does not adopt any particular EPA informal guidance to be required guidance for [NYS]DEC staff.”³⁰

²⁴ *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emission Offset Interpretative Ruling*, 45 Fed. Reg. 59874 (September 11, 1980).

²⁵ Letter from Raymond Werner, Air Programs Branch Chief, U.S. EPA Region 2, to David Shaw, Division of Air Resources Director, New York State Department of Environmental Conservation, “Re: Common Control Determinations in the Permitting of Landfills and Companion Gas-To-Energy Operations” (July 18, 2006).

²⁶ See Declaratory Ruling at 7–13.

²⁷ Declaratory Ruling at 13.

²⁸ Declaratory Ruling at 13. (emphasis added).

²⁹ *In the Matter of Seneca Energy II, LLC*, Order on Petition No. II-2012-01 (June 29, 2015).

³⁰ 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 [NYS]DEC source determination would not change.” *Id.* at 6 n.5.

III. BACKGROUND

A. The Facility

The Energy Facility is located in Seneca Falls, New York, across and adjacent to the Seneca Meadows Landfill (the Landfill). The Energy Facility produces electrical power for sale on the open market by combusting gas collected from the Landfill.³¹ The Energy Facility and the Landfill have separate title V permits issued by the NYSDEC; the respective title V permits treat each as separate sources, with separate unrelated control requirements.

B. Permitting History

The NYSDEC published notice of the Energy Facility's draft title V permit and availability for public comment pursuant to N.Y.C.R.R. 621.7 on March 25, 2013. The public comment period extended from March 27, 2013, to April 26, 2013. The Petitioner submitted comments on the draft title V permit during the public comment period on April 12, 2013, and April 17, 2013 by email and on April 22, 2013, by letter. On May 29, 2013, the EPA received the Energy Facility's proposed title V permit, the NYSDEC's Responsiveness Summary, and the NYSDEC's source determination rationale. The EPA did not object to the Energy Facility's proposed title V permit within 45 days, pursuant to CAA section 505(b)(1). On July 19, 2013, the NYSDEC issued the Energy Facility's final title V permit (Permit No. 8-4532-00075-00029).

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). Thus, petitions seeking the EPA's objection to the Energy Facility title V Permit were due by September 11, 2013. The EPA received the Petition, dated September 9, 2013, on September 11, 2013. Accordingly, the EPA finds that the Petitioner timely filed this Petition.

IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONER

Claim 1. The Petitioner Claims that the Energy Facility and the Landfill Are a Single Source.

Petitioner's Claim:

The Petitioner generally claims that the EPA should object to the Energy Facility title V permit because the permit does not consider the Landfill and the Energy Facility a single stationary source for title V and PSD/NSR purposes.³² Specifically, the Petitioner contends that the Landfill and the Energy Facility *together* constitute a single major stationary source of emissions because

³¹ NYSDEC Rationale at 2.

³² Petition at 4, 12.

the two facilities belong to the same major industrial group, are located on contiguous parcels of property, and are under common control.³³

The Petitioner proffers some evidence to support its conclusion that the Landfill and Energy Facility are under common control.³⁴ The Petitioner first states that the Declaratory Ruling “adopts the criteria” of the Spratlin Letter and several other EPA guidance memos for such determinations.³⁵ With regard to the NYSDEC’s common control analysis, the Petitioner suggests that the NYSDEC incorrectly concluded in its RTC that common ownership is required for a determination of common control for purposes of determining title V applicability.³⁶ The Petitioner also contends, “NYSDEC fails to address whether the [Energy Facility] is currently dependent on the landfill, as a practical matter, without any further expansion of landfilling and whether there are any plans to re-fit [the Energy Facility] to utilize alternative fuels.” *Id.* at 9.

The Petitioner further describes a number of factors that the Petitioner believes to be indicative of a common control relationship between the Energy Facility and the Landfill. *Id.* at 6–10. These factors include:

- (1) The Landfill and Energy Facility would share equally in tax credits available to the Energy Facility;³⁷
- (2) The Landfill gas is currently the Energy Facility’s only fuel source and there is no indication of any plans to re-fit the Energy Facility to utilize another gas supplier;³⁸

³³ For support, the Petitioner asserts that the two facilities “are considered a single stationary source under PSD/NSR and title V when the facilities belong to the same major industrial grouping under the Standard Industrial Classification code, are located on one or more adjacent or contiguous properties, and are under common control.” *Id.* at 4 (citing 40 C.F.R. § 51.166(b)(5), (6)). Further, the Petitioner claims, “[W]here these three criteria are met and combined emissions of the facilities exceed PSD/NSR minor source limits, the facilities must obtain a PSD permit from EPA prior to commencing operations. *Id.* (citing EPA, Letter to Christopher Pilla, Virginia DEQ, April 4, 2002). The Petitioner states, “Where a common control determination is made, Title V permits must be issued to both facilities as a single source.” *Id.* Based on the above information, the Petitioner contends that the Landfill and the Energy Facility “share a major industrial grouping, and the [Energy Facility] is located on the landfill site.” *Id.* at 5 (citing 40 C.F.R. § 51.166(b)(5)). In support of this final proposition, the Petitioner also cites “Cf. p. 1,” but it is unclear what this citation is intended to cross-reference. *See id.*

³⁴ The Petitioner states, “[S]ince the EPA has already determined that the information examined regarding the relationships between these entities does not rebut the presumption of common control.” Petition at 12. The Petitioner appears to be referencing a March 2, 2010 letter from Steven C. Riva to Peter H. Zelifff concerning the EPA’s review of Seneca Energy’s PSD permit application. However, the Petitioner’s reliance on that EPA letter ignores critical context: At the time of the March 2, 2010 letter, the EPA itself was the PSD permitting authority in New York, not the NYSDEC. As explained in Section II.A of this Order, that is no longer the case; the EPA has since approved New York’s own PSD program and is thus no longer the PSD permitting authority for New York sources. NYSDEC, not the EPA, is the permitting authority for the title V permit at the heart of the Petition. Therefore, the EPA’s prior letter is not dispositive of whether NYSDEC’s record is adequate to support its determination that the two facilities are not under common control.

³⁵ Petition at 5.

³⁶ *Id.* at 6.

³⁷ *Id.* at 6–7 (citing Exhibit F).

³⁸ *Id.* at 7, 9.

- (3) The Energy Facility has first rights to all gas produced at the Landfill limited to quantities sufficient to meet the Energy Facility requirements;³⁹
- (4) The Landfill shares control of the landfill gas collection system with the Energy Facility and the Energy Facility depends on the Landfill to install, operate, and maintain the gas collection system;⁴⁰
- (5) The terms of the Gas Assignment Agreement between the entities require the Energy Facility plant to provide a steady flow of treated landfill gas to the Landfill;⁴¹
- (6) The condensate generated by the Energy Facility's landfill gas transport and treatment process is pumped through a sealed system into the Landfill leachate collection system, which is one indicator that the Energy Facility depends on the Landfill for disposal;⁴² and
- (7) The Landfill's parent company's website and public signs adjacent to Seneca Energy's Seneca Falls site openly advertises to the local population that the Landfill, as opposed to the Energy Facility, is in control.⁴³

The Petitioner also asserts that signage located on the landfill site and statements on a website are indicators that the facilities consider themselves a single source.⁴⁴

EPA's Response: For the reasons stated below, the EPA denies the Petitioner's request for an objection on this claim.

As explained in Section II.C of this Order, the EPA's interpretation for over 36 years has been that common control determinations are made on a case-by-case basis.⁴⁵ Thus, as described above, title V permitting authorities have reasonable discretion when making common control determinations in accordance with applicable legal requirements.⁴⁶ Accordingly, "the EPA generally will not substitute its judgment for that of" the relevant part 70 permitting authority.⁴⁷

Because common control is often such a fact-specific inquiry involving a permitting authority's exercise of discretion, it is critical that a petitioner directly address the permitting authority's explanation of its common control analysis—not just the ultimate conclusion. In this case, that means the Petitioner must demonstrate that NYSDEC did not make its determination based on

³⁹ *Id.* (citing Exhibit F).

⁴⁰ *Id.* at 8–9 (citing Exhibit F).

⁴¹ *Id.* 8(citing Exhibit F).

⁴² *Id.* at 9–10 (citing Exhibit F).

⁴³ *Id.* at 11 (citing Exhibits H, I, and J).

⁴⁴ *Id.* at 11–12.

⁴⁵ *See, e.g.*, 45 Fed. Reg. 59874, 59878 (September 11, 1980) (discussing the "difficult factual determination[s]" involved in common control issues).

⁴⁶ *See* 2015 Seneca Energy Order at 17.

⁴⁷ *Id.* at 3.

reasonable grounds supported by the permit record—not merely that the Petitioner (or even the EPA) would have come to a different conclusion had it been the permitting authority instead.⁴⁸

In this case, the Petitioner makes two specific allegations concerning NYSDEC’s common control analysis.

The Petitioner first claims that the NYSDEC’s response-to-comments document “fails to address” whether the Energy Facility is “currently dependent on the landfill, as a practical matter, without any further expansion of landfilling and whether there are any plans to re-fit SE’s facility to utilize alternative fuels.”⁴⁹ The EPA rejects this basis for objection for two independent reasons. First, this basis for an objection was not raised with reasonable specificity during NYSDEC’s public comment period. No commenter asserted that fuel dependence was a basis for concluding that the facilities are under common control, or argued that as a practical matter the Energy Facility would have to be retrofitted to accept alternative fuels.⁵⁰ Second, NYSDEC did in fact address the Energy Facility’s dependence on the Landfill as a fuel source. In a portion of the permit record not included or analyzed in the Petition, NYSDEC asserted that the Energy Facility was not dependent on the Landfill because it has “the option to use [landfill gas] or another fuel if it makes economic sense”⁵¹ While the Petitioner may disagree with *how* NYSDEC evaluated fuel dependency, it is incorrect to say that NYSDEC “fail[ed] to address” the issue at all.⁵²

The Petitioner’s second specific allegation concerning NYSDEC’s common control analysis is that the NYSDEC improperly rejected the Petitioner’s own assertions of common control “based principally on the lack of common ownership” between the facilities.⁵³ While the Petitioner is correct that lack of common ownership is never sufficient to preclude a finding of common control, the Petitioner is incorrect that NYSDEC concluded that the two facilities were not under common control primarily due to a lack of common ownership. Common ownership is one of several considerations that the NYSDEC discussed in its rationale as grounds for determining that the two facilities were not under common control. Although NYSDEC determined “there is no indication of common ownership” between the Energy Facility and the Landfill, NYSDEC did not indicate that this lack of common ownership ends its common control inquiry.

⁴⁸ See *supra* note 34.

⁴⁹ *Id.* at 9.

⁵⁰ One commenter (the Petitioner) cited a March 2, 2010, letter from the EPA, and that letter included a brief statement about the Energy Facility’s source of fuel. However, the commenter cited that letter to bolster the reasonableness of the commenter’s own view that there is “no information in [the application for this title V permit] that overcomes the presumption that the [Energy Facility] and [Landfill] are under common control,” Concerned Citizens of Seneca County, Inc. Public Comments, at 2 (April 22, 2013), not as an issue for NYSDEC to address independently. Furthermore, as discussed below, NYSDEC is not required by either federal or state law to apply a “presumption” of common control, and, as explained in footnote 48 of this Order, the EPA issued that March 2, 2010, letter in a critically different context.

⁵¹ NYSDEC, “Rationale for Determining What Constitutes a Major Source/Facility at Seneca Meadows Landfill (SMI) and Seneca Energy (SE)” (May 21, 2013) at 3.

⁵² As described in Section II of this Order, the EPA’s determination is based on whether the Petitioner itself has demonstrated that NYSDEC’s determination in this matter was inadequate.

⁵³ Petition at 5–6. The Petitioner correctly noted that common ownership is not required for a finding of common control. *Id.* at 6.

Critically, the Petitioner did not append to the Petition, cite, or otherwise address the substance of the NYSDEC’s five-page rationale explaining its determination that these facilities are not under common control.⁵⁴ That rationale was not limited to the fact that the facilities at issue lack common ownership. Instead of grappling with the NYSDEC’s analysis, the Petitioner makes its own affirmative argument about why the facilities are under common control—analyzing the facts as if the Petitioner was the permitting authority rather than addressing the reasonableness of the state’s analysis.⁵⁵ This failure to address the state’s reasoning constitutes an independent reason that the Petition has not met its demonstration burden.⁵⁶

For similar reasons, the Petitioner is incorrect in its assertion that the “EPA has already determined that the information examined regarding the relationships between these entities does not rebut the presumption of common control.”⁵⁷ To the extent that the Petitioner is referring to EPA Region 2’s March 2, 2010, letter to Peter Zelif, ⁵⁸ that letter is not dispositive of whether the NYSDEC in 2013 developed a record adequate to support its determination that the facilities are not under common control for purposes of New York’s title V program.

Although the letter to Mr. Zelif states, “EPA presumes one facility located within another facility establishes a ‘control’ relationship,” at the time of that letter, the EPA was the PSD permitting authority in New York, and EPA Region 2 had thus appropriately taken responsibility for making common control determinations. As noted above, while the EPA presumes for federal permitting purposes that co-located such facilities are under common control, the state, local, or tribal governments that operate part 70 permitting programs are not required to apply the same rebuttable presumption:

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. 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

⁵⁴ See NYSDEC, “Rationale for Determining What Constitutes a Major Source/Facility at Seneca Meadows Landfill (SMI) and Seneca Energy (SE)” (May 21, 2013).

⁵⁵ See Petition at 5–10.

⁵⁶ 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 (December 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); 45 Fed. Reg. 59874, 59878 (September 11, 1980).

⁵⁷ Petition at 12.

⁵⁸ See Petition Exhibit G.

the agency will shift the burden to the facilities themselves to offer sufficient facts to overcome that sensible presumption.

* * *

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 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.⁵⁹

Simply put, no federal regulations require the NYSDEC to presume that co-located facilities are under common control. Nor does New York law require NYSDEC to apply that rebuttable presumption, as explained above in Section II.C.2.b. The Petitioner is thus incorrect in asserting that the facilities at issue here must be presumptively treated as under common control.⁶⁰ The relevant question for this title V permit (which is a title V permit issued by NYSDEC, not a PSD permit issued by the EPA) is whether the permitting authority's common control determination was reasonable, not whether NYSDEC's determination is identical to what the EPA would have determined if the agency itself had been the permitting authority.

With regard to the Petitioner's assertions that signage and statements on a website are indicators that the facilities consider themselves a single source,⁶¹ it is unclear to the EPA how these assertions support a determination that the Energy Facility and the Landfill are under common control. Even assuming *arguendo* that statements on signage or a website are relevant to the common control analysis, in this case neither the signage identifying the location of the facilities nor the online statement "impl[ying] control" *per se* establishes a common control relationship. Accordingly, the Petitioner must engage with the substance of the permitting authority's common control analysis. The Petitioner did not do that here.

For the foregoing reasons, the EPA denies the Petitioner's request for an objection to the permit on this claim.

⁵⁹ See 2016 Seneca Energy Order at 6–7.

⁶⁰ The EPA notes that Declaratory Ruling 19-19, the NYSDEC's seminal statement on common control, was itself precipitated by a request for a declaratory ruling on the common control status of Seneca Meadows, Inc. However, the NYSDEC "decline[d] to rule" in Declaratory Ruling 19-19 "whether [Seneca Meadow, Inc.]'s landfill and [Seneca Energy]'s power plant are 'under common control,'" reserving that question for a "thorough review by the [NYSDEC]" at a later time. See Letter from Alison H. Crocker, Deputy Counsel, NYSDEC, to Scott M. Turner, Nixon Peabody LLC, *In the Matter of the Petition of Seneca Meadows, Inc. for a Declaratory Ruling* (September 9, 2011).

⁶¹ Petition at 11–12.

Claim 2. The Petitioner Claims that the Title V Permit Is a Sham Permit.

Petitioner's Claim:

The Petitioner claims that the title V permit is a sham permit because:

NYSDEC has failed to calculate the combined potential to emit of all emission sources; the [Landfill] and [Energy Facility] *considered as a single source* has in fact been operating at major sources levels; and both facilities have, are, or soon will be, seeking to expand capacity, but only SE's expansion is considering in the title V permit.⁶²

The Petitioner emphasizes that, under 40 C.F.R. § 63.4(b), “fragmentation of an operation such that the operation avoids regulation by a relevant standard” is unlawful under the CAA.⁶³ For further support, the Petitioner cites a memorandum from Terrel Hunt and John Seitz, USEPA, Guidance on Limiting Potential to Emit in New Source Permitting (June 13, 1989). The Petitioner contends that all of the criteria provided in the Terrel Hunt and John Seitz memo for a sham permit are present in this case.⁶⁴ In particular, the Petitioner asserts that the Energy Facility's and Landfill's “respective Title V modification applications indicate that *the combined facilities* operate at levels exceeding current permit limitations,” and continue to operate at those levels into the future.⁶⁵

EPA's Response: For the reasons stated below, the EPA denies the Petitioner's request for an objection on this claim.

To the extent that the Petitioner intended for the discussion included on pages 3 and 10–11 of the Petition to constitute a separate claim, this claim is substantially related to the Petitioner's Claim 1 regarding the source determination for the Energy Facility and the Landfill. Thus, to the extent that the issues described above overlap with Claim 1, the EPA considers them responded to as part of the denial issued on Claim 1.

Petitioners' sham permitting claim presupposes that the Energy Facility and Seneca Meadows Landfill are a single source for CAA permitting purposes.⁶⁶ However, for the reasons stated in the EPA's response to Claim 1, the Petitioner has not met its burden of demonstrating that the Energy Facility and Seneca Meadows Landfill are under common control, and thus has not demonstrated that the NYSDEC improperly permitted the two facilities as separate stationary sources.⁶⁷

⁶² *Id.* at 3 (emphasis added).

⁶³ *Id.* at 10 (citing 40 C.F.R. § 64.3).

⁶⁴ *Id.* at 10 (citing Exhibits G and F).

⁶⁵ *Id.* at 11 (emphasis added).

⁶⁶ *Id.* at 10 (discussing how sham permitting allows “a source” to subvert CAA requirements); *id.* at 11 (contending that emissions from the “combined facilities” exceed the emissions authorized by either permit individually).

⁶⁷ See Letter from John B. Rasnic, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, U.S. EPA, to George T. Czerniak, Chief, Air Enforcement Branch, EPA Region 5, “Applicability of

To the extent that the Petitioner intended to allege that the title V permit did not adequately consider an expansion of the Energy Facility alone, neither that argument nor any remaining issues not overlapping with Claim 1.A on pages 10 to 11 of the Petition, were raised with reasonable specificity during the public comment period, as required by CAA § 505(b)(2) and 40 C.F.R. § 70.8(d).⁶⁸ Further, the Petitioner neither demonstrates that it was impracticable to raise such objections at that time, nor demonstrates any basis for finding that grounds for such objections arose later.

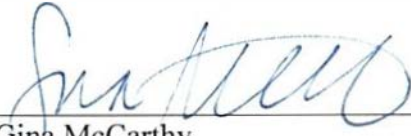
The EPA has previously explained that a title V petition should not be used to raise arguments to the EPA that the state has had no opportunity to address, and the requirement to raise issues “with reasonable specificity” places a burden on the commenters, absent the circumstances described in the Act, to present the state with information that would support a demonstration that the permit is not in compliance with the Act.⁶⁹

For the foregoing reasons, and to the extent that it raises a claim that is separate from Claim 1, the EPA denies the Petitioner’s request for an objection to the permit on this claim.

V. CONCLUSION

For the reasons set forth above, and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petition as described above.

Dated: Dec 9, 2016



Gina McCarthy
Administrator

New Source Review Circumvention Guidance to 3M- Maplewood, Minnesota” (June 17, 1993) at 2–3 (describing sham permitting).

⁶⁸ Notably, the Petition also includes a partial sentence referencing 40 C.F.R. Subpart WWW, presumably referencing a requirement from part 60, as well as an allegation that the NYSDEC did not engage in “a PSD/NSR preconstruction review” required due to the magnitude of combined emissions from the two facilities. See Petition at 3. Again, these appear related to the issues the EPA addressed in response to Claim 1. Furthermore, the Subpart WWW statement was not raised with reasonable specificity during the public comment period.

⁶⁹ *In the Matter of Luminant Generation Company – Big Brown, Monticello, and Martin Lake*, Order on Petition Nos. VI-2014-01; VI-2014-02; VI-2014-03 (January 2, 2015) at 7.