BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF | ) | PETITION NUMBER II-2012-01 |
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| SENECA ENERGY II, LLC | ) | |
| SENECA, NEW YORK | ) | ORDER RESPONDING TO THE |
| | ) | DECEMBER 22, 2012 REQUEST FOR |
| PERMIT NUMBER: 8-3244-00040/00002 | ) | OBJECTION TO THE ISSUANCE OF A |
| | ) | TITLE V OPERATING PERMIT |
| ISSUED BY NEW YORK STATE | ) | |
| DEPARTMENT OF ENVIRONMENTAL | ) | |
| CONSERVATION | ) | |
| | ) | |

**ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR OBJECTION TO PERMIT**

This Order responds to issues raised in a petition to the U.S. Environmental Protection Agency (the EPA or the Agency) by the Finger Lakes Zero Waste Coalition (the Petitioner), dated December 22, 2012 (2012 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 Petition requests that the EPA object to the operating permit issued by the New York State Department of Environmental Conservation (DEC) 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 (Seneca 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.

## I. INTRODUCTION

The 2012 Petition requests that the EPA object to the 2012 Seneca Energy Facility Title V Permit on one primary basis: that the Seneca Energy Facility and the adjacent Ontario County Landfill (the landfill) are a single source. The specific issues raised in the Petition are described in detail in Section IV of this Order.

Based on a review of the 2012 Petition, and other relevant materials, including the 2012 Seneca Energy Facility Title V Permit, the permit record for the facility, and relevant statutory and

regulatory authorities, and as explained more fully below, I grant in part and deny in part the 2012 Petition for the reasons set forth in this Order.

## 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, 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 (Nov. 17, 2010) and 40 C.F.R. §§ 52.1670 (discussing approval of PSD provisions in cite to PSD SIP). As the DEC 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 DEC 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 Envt'l 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 (Aug. 12, 2009); *In re East Kentucky Power Cooperative, Inc. Hugh L. Spurlock Generating Station*, Order on Petition No. IV-2006-4 (Aug. 30, 2007); *In re Pacific Coast Building Products, Inc.* (Order on Petition) (Dec. 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 issuance of the permit if the EPA determines that the permit is not in compliance with applicable requirements of the Act. 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 Agency 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, §

[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).

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. The 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 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); *La. Dep't of Envt'l Quality v. EPA*, 730 F.3d 446, 447 (5th Cir. 2013). 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).

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 ("it is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of 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 (§ 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 ("Section 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. We discuss certain aspects of the petitioner demonstration burden below; however, a fuller discussion 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 that the permit is not in compliance with the requirements of the Act, including the requirements of the applicable SIP. *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 the state's explanation in response to comments 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) 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 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 ("the Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive"); 2011 *Murphy Oil Order* at 12 (denying a title V petition claim where the 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 (Jan. 15, 2013) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (Apr. 20, 2007) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (Mar. 15, 2005) at 12, 24. Also, if the petitioner does 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 Number: VIII-2010-XX (June 30, 2011) at 7–10; *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.

As explained in a prior EPA title V order, when a state responds to an EPA title V objection by supplementing the permit record, that response is treated as a new proposed permit for purposes of CAA section 505(b) and 40 C.F.R. §§ 70.8(c) and (d). *See 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 14. As explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions; for example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id.* at 14 n.10. The EPA also explained in that order that treating a state's response to an EPA objection as triggering a new EPA review and petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Id.* at 14–15.

## 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 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

*Overview of Federal Regulations and Policy*

Neither the Clean Air Act 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

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[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 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 (Aug. 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).

"some specified voting share." 45 *Fed. Reg.* 59874, 59878 (Sept. 11, 1980). 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." *Id.* 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."[3]

*Id.* (quoting 17 C.F.R. § 210.1-02(g) (1980)).

The EPA discussed the term "common control" in a September 18, 1995, letter from William A. Spratlin, the Director of EPA Region 7's Air, RCRA and Toxics Division, to Peter R. Hamlin, the Air Quality Bureau Chief of Iowa's Department of Natural Resources (the "Spratlin Letter").[4] 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.[5] 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. 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.

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[3] 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.

[4] 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 Dep't of Natural Resources (Sept. 18, 1995) (hereinafter "Spratlin Letter"), *available at* http://www.epa.gov/region7/air/title5/t5memos/control.pdf.

[5] *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.").

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.[6] Several examples involving landfills and landfill gas-to-energy (LFGTE) facilities illustrate the EPA's approach to addressing common control for "companion" facilities.

One example involves the Houston County Landfill, PowerSecure, and Flint Electric Membership Cooperative (FEMC).[7] In that case, the state of Georgia requested that the EPA make a common control determination concerning an LFGTE facility and a "companion" landfill.[8] The EPA's response began by noting that, "[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."[9] 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."[10]

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 . . . ."[11] 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.[12] In addition to the fact that presumes common control when one entity locates on another entity's property, the EPA noted additional case-specific "factors"[13] in the relevant landfill gas purchase and sales agreement that supported a determination of common control between the three entities:[14]

> (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.

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[6] *See, e.g.*, Letter from Jane M. Kenny, Reg'l Admin'r, U.S. EPA Region 2, to Erin M. Crotty, Comm'r, New York State Dep't of Envtl. 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* http://www.epa.gov/region07/air/title5/t5memos/alturi.pdf.

[7] *See* Letter from Gregg M. Worley, Air Permits Section Chief, U.S. EPA Region 4, to James Capp, Air Prot. Branch Chief, Envtl. Prot. Div., Georgia Dep't of Natural Res. (Dec. 16, 2011) (hereinafter "PowerSecure Letter"), *available at* http://www.epa.gov/region7/air/nsr/nsrmemos/ps2011.pdf.

[8] PowerSecure Letter at 1.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 2–3.

[13] 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.

[14] *See id.* at 3.

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.[15]

A second example involves the Maplewood Landfill and a "companion" LFGTE facility of Industrial Power Generating Corporation (INGENCO).[16] 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 that, "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."[17]

After reviewing the facts before the Agency, the EPA stated that "if EPA were making the determination, we would find . . . that Maplewood and INGENCO are not under common control."[18] 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.[19] 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.

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[15] *See id.* at 3.
[16] *See* Letter from Judith M. Katz, Air Prot. Div. Dir., U.S. EPA Region 3, to Gary E. Graham, Envtl. Eng'r, Virginia Dep't of Envtl. 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* http://www.epa.gov/region7/air/title5/t5memos/20020501.pdf.
[17] Maplewood/INGENCO Letter at 4.
[18] *Id.*
[19] *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.

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.

*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 DEC issued the Declaratory Ruling 19-19 ("Declaratory Ruling"), which explained factors the DEC 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." N.Y. S.A.P.A. § 204.1, 6 N.Y.C.R.R. Part 619. Therefore, the Declaratory Ruling appears to be a reliable guide to the DEC's decision-making on the issue of common control. According to the Declaratory Ruling, the DEC 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 cited in the Declaratory Ruling included the 1980

rule addressing common control;[20] the Spratlin Letter; a generally applicable four-factor approach to conducting source determinations; the "Werner Letter" providing guidance to DEC on source determinations for landfills and companion LFGTE facilities;[21] and a series of common control determination letters, including the Maplewood/INGENCO Letter. *See* Declaratory Ruling at 7–13. 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.

Declaratory Ruling at 13.

## III. BACKGROUND

### A. The Facility

The Seneca Energy Facility is located in Seneca, New York, adjacent to the Ontario County Landfill.[22] The Seneca Energy Facility produces electrical power for sale on the open market by combusting scrubbed gas collected from the Ontario County Landfill.[23] The DEC issued a final title V permit to Ontario County Landfill (Landfill Title V Permit) on December 2, 2014.[24] The Ontario County Landfill Title V Permit is separate from the 2012 Seneca Energy Facility Title V Permit. The respective permits treat the Seneca Energy Facility and Ontario County Landfill as separate title V major sources.

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[20] *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emission Offset Interpretative Ruling*, 45 FR 59874 (Sept. 11, 1980).

[21] Letter from Raymond Werner, Air Programs Branch Chief, U.S. EPA Region 2, to David Shaw, Div. of Air Res. Dir., New York State Dep't of Envtl. Conservation, "Re: Common Control Determinations in the Permitting of Landfills and Companion Gas-To-Energy Operations" (July 18, 2006).

[22] Permit Review Report for Seneca Energy Facility Permit at 2.

[23] *Id.*

[24] Ontario County Landfill Title V Permit No. 8-3244-00004/00007.

### B. Permitting History

On January 9, 2011, Seneca Energy submitted a title V permit application to the DEC for a renewal title V permit and title V permit modification to the Seneca Energy Facility. On September 22, 2011, Seneca Energy requested a determination on common control from the DEC. In a letter dated January 5, 2012, the DEC stated its conclusion that the landfill and the Seneca Energy Facility were not under common control:

> Based on the available information from EPA and DEC, as well as additional information provided by Seneca Energy, Ontario County and Casella [the landfill operator], it is this Department's finding that for NSR and PSD purposes under 6 NYCRR Part 231, Ontario County Landfill and Seneca Energy [Facility] will continue to be treated as two separate facilities.[25]

The DEC published a notice of the draft Seneca Energy Facility Title V Permit and availability for public comment pursuant to N.Y.C.R.R. 621.7 on July 18, 2012. The public comment period extended from July 18, 2012, to August 17, 2012. The Petitioner submitted comments on the draft 2012 Seneca Energy Facility Title V Permit during the public comment period on August 17, 2012. The DEC received comments only from the Petitioner on the draft Seneca Energy Facility Title V Permit and made no changes to the permit in response to the comments received. The EPA received the proposed Seneca Energy Facility Title V Permit and the Responsiveness Summary containing the DEC's response to public comments from the DEC on September 12, 2012. The EPA did not object to the proposed Seneca Energy Facility Title V Permit within 45 days, pursuant to CAA section 505(b)(1).

On October 30, 2012, the DEC issued the final Seneca Energy Facility Title V Permit to Seneca Energy.

### 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. § 766ld(b)(2). Thus, petitions seeking the EPA's objection to the Seneca Energy Facility Title V Permit were due by December 26, 2012. The EPA received the Petition, dated December 22, 2012, on December 26, 2012. Accordingly, the EPA finds that the Petitioner timely filed this Petition.

## IV. EPA DETERMINATION ON THE ISSUES RAISED BY THE PETITIONER

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[25] *See* Petition Exhibit M (Letter from Thomas L. Marriott, P.E., Division of Air Resources, New York Dept. of Envtl. Conservation Region 8, to Emily Zambuto, Seneca Energy II, LLC, "Re: Ontario LF LFGTE Facility and Ontario County Landfill Major Source/Facility Determination" (Jan. 5, 2012)). The January 2012 Seneca Energy Title V Permit Application states on page 2 of the Emission Calculation Discussion that Casella Waste Services (Casella) is the operator of the Ontario County Landfill.

**Claim 1. The Petitioner Claims that Seneca Energy and Ontario County's Landfill are a Single Source.**

***Petitioner's Claim.*** The Petitioner claims generally that the EPA should object to the Seneca Energy Facility Title V Permit because the permit does not consider the landfill and the Seneca Energy Facility a single source. *See* Petition at 3. The Petitioner also asserts that 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." Petition at 13 (citing 40 C.F.R. § 51.166(b)(5), (6)).[26] The Petitioner claims that, "where these three criteria are met, and the combined emissions exceed PSD/minor NSR source limits, the facilities must obtain a PSD permit from the EPA before commencing operation." *Id.* The Petitioner also claims, "where a common control determination is made, title V permits must be issued to both facilities as a single source." *Id.*

The Petitioner provides additional support for its contention that the landfill and Seneca Energy Facility are under common control. The Petitioner first states that the Declaratory Ruling "adopts the criteria" of the Spratlin Letter and several other EPA guidance memos for such determinations. Petition at 14. The Petitioner next states that the DEC incorrectly concluded in its Responsiveness Summary that common ownership is required for a determination of common control for purposes of determining title V applicability. Petition at 15. The Petitioner further describes a number of factors that the Petitioner believes to be indicative of a common control relationship between the Seneca Energy Facility and the Ontario County Landfill. These factors include:

(1) the landfill gas is currently the Seneca Energy Facility's only fuel source;[27]
(2) the landfill and Seneca Energy Facility would share equally in tax credits available to the Seneca Energy Facility;[28]
(3) the Seneca Energy Facility is obligated to return treated gas to the landfill at no cost and the treated gas powers a boiler serving the landfill office building;[29]
(4) the landfill shares control of the landfill gas collection system with the Seneca Energy Facility, including by contractually allowing employees of the Seneca Energy Facility access to the landfill property to make repairs when the landfill is unmanned, and that

[26] In support of its contention that the two facilities share a major industrial group and that the Seneca Energy Facility is located on the landfill site, the Petitioner points to Petition Exhibit L, which appears to be a December 22, 2011 letter from David G. Carpenter, Esq., Associate General Counsel for Casella Waste Systems, to Michele Kharroubi of the DEC. *See* Petition at 14 (citing Exhibit L). This letter states: "(1) The landfill has the two digit SIC Code 49. To Casella's knowledge, the Seneca Energy Facility also shares this SIC Code; (2) The SIC Code for the Landfill is 4953; and (3) The Seneca Energy Facility is constructed on property leased directly from Ontario County. The landfill and other ancillary structures are constructed on land leased directly to Casella. The properties are contiguous." Exhibit L at 1.

[27] Petition at 16 (citing Exhibit B).

[28] *Id.* (citing Exhibit O).

[29] *Id.* (citing Exhibit O).

such access to the landfill is necessary given that the Seneca Energy Facility is designed to continuously operate;[30]

(5) the terms of the agreements between the entities require the Seneca Energy Facility to provide a steady flow of treated landfill gas to the landfill;[31] and

(6) the condensate generated by Seneca 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 Seneca Energy Facility depends on the landfill for disposal.[32]

With regard to the first point, the Petitioner explains that the DEC stated in its Responsiveness Summary[33] that the engines at the Seneca Energy Facility "can also run on natural gas" and that "there is the ABILITY to hook up to those lines and purchase natural gas." Petition at 16 (citing Exhibit B).[34] According to the Petitioner, the DEC's response indicates that the Seneca Energy Facility is not currently configured to receive anything other than landfill gas from the landfill. With regard to the last point, the Petitioner contends that "DEC's response fails to address whether SE is currently dependent on the landfill." Petition at 20.

***EPA's Response.*** For the reasons stated below, the EPA grants the Petitioner's request for an objection on this claim. The response below begins with a review of the single source criteria, discusses the Petitioner's demonstration and analysis around those criteria, provides some clarifications regarding the single source criteria, and concludes with direction to DEC regarding the EPA's objection on this claim.

***Single Source Determination***

As explained previously in Section II.C.1 of this Order, three elements must be met for facilities to constitute a single major source for title V purposes or a single major stationary source for PSD purposes. The facilities must be (1) located on one or more contiguous or adjacent properties; (2) belong to a single major industrial grouping; 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). The facilities must also be a title V major source or PSD major stationary source for one or more pollutants. The EPA observes that the 2012 Seneca Energy Facility Title V Permit states that the Seneca Energy Facility is a title V major source of carbon monoxide (CO) and nitrogen dioxide (NOx). *See* Seneca Energy Facility Title V Permit at 1. As stated above, the Petitioner claims that Ontario County Landfill and Seneca Energy Facility are located on contiguous properties and have the same two-digit SIC code. Accordingly, whether the two facilities must be treated as a single stationary source rests on the remaining source determination criterion of common control.

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[30] *Id.* at 18–19 (citing Exhibit T; 6 N.Y.C.R.R. 208.3(b)(2)(ii)(a)).

[31] *Id.* at 19 (citing Exhibit ●).

[32] *Id.* at 20–21 (citing Exhibit P).

[33] *See* Petition Exhibit B (New York State Dep't of Envtl. Conservation, *Responsiveness Summary – Seneca Energy II LLC, Ontario County Landfill Gas to Energy Facility, Draft Renewed and Modified Title V Permit, DEC Application ID 8-3244-00040/00002* (Sept. 11, 2012)).

[34] The Petitioner cites to Response to Comment 6, but the quoted language appears below what the DEC in its Responsiveness Summary calls, "Comment 5."

***Common Control***

As explained previously in Section II.C.2 of this Order, the EPA has rejected a narrow interpretation of "control" in favor of the ordinary broad meaning, which is typified by the general Securities and Exchange Commission definitions and broad dictionary definitions that EPA has highlighted in the past. The EPA's past practices, some of which are described in Section II.C.2, illustrate the Agency's own process for conducting a case-by-case analysis. The Petition addresses the three prongs of the single source determination, with additional discussion on the common control issue. Petition at 14–21.

In its public comments, the Petitioner concluded that the two facilities were under common control as described in the Spratlin Letter. The Petitioner's public comments further explained that its conclusion was based on an examination of the questions in the Spratlin Letter, which it indicated were also reiterated in the Werner Letter and cited in the Declaratory Ruling. Public Comment Letter at 2. The Petitioner's public comment letter then included eight questions from the Spratlin Letter, and gave its analysis related to each of the eight questions, concluding that a common control relationship existed. *Id.*

The DEC's response to the Petitioner's comments on common control issues did not affirmatively identify or explain the facts and factors upon which it based its determination that the facilities are not under common control. Instead, it begins by stating that there is "no indication of common ownership between Seneca Energy II, LLC (Seneca Energy), Ontario County and Casella Waste Systems of Ontario, LLC (Casella)." Responsiveness Summary at Part 3, Response to Comment 1.

The DEC next stated that it makes common control determinations on a case-by-case basis, in accordance with the Declaratory Ruling:

> As stated in the Declaratory Ruling, the determination of whether two or more facilities are under common control is made on a case-by-case basis. In utilizing the case-by-case approach, Department staff may be guided by the EPA's informal guidance documents and determination letters, such as the Spratlin guidance letter. As explained in the Declaratory Ruling, the questions set forth in the Spratlin Letter should be utilized as a non-exhaustive "screening tool" to determine whether common control exists. As Spratlin explained, major indicators such as common ownership or common management may indicate the existence of a common control relationship, as well as a combination of several non-major indicators. However, there is no obligation to rely exclusively on any particular guidance document, simplifying test, or factor therein. The Department continues to utilize the case-by-case approach for common control determinations, taking into account the EPA's numerous informal guidance documents and precedent.

Responsiveness Summary in response to Comment 1.

Further, in its Responsiveness Summary, the DEC addressed the eight specific considerations raised in the Public Comment Letter. In responding to these eight considerations in the Public Comments, however, the DEC merely provided targeted rebuttals to some of the facts presented by the commenter under each of the eight considerations. The DEC did not explain why these eight considerations are or are not applicable for determining whether the Seneca Energy Facility and the Ontario County Landfill are under common control in light of federal and state title V regulations and the Declaratory Ruling. Instead, the DEC responded in part to the facts raised under each of the eight considerations raised by the commenters, giving its view of why some of the facts in each as presented by the commenters did not indicate a common control relationship. As previously noted, according to the Declaratory Ruling, "the determination of whether two or more facilities are under common control is made on a case-by-case basis." Declaratory Ruling at 7. In this particular case, however, the DEC did not fully explain how its review of the facts – including all of the commenter's facts reiterated by Petitioner – led the DEC to conclude that the two facilities were not under common control.

In other words, while the DEC responded to some of the Petitioner's specific statements regarding facts potentially relevant to the common control analysis, what is missing from the permit record is the DEC's explanation of its decision-making process for determining that the Seneca Energy Facility and the Ontario County Landfill were not under common control. The record does not include an affirmative explanation of the DEC's basis for disagreeing with the commenter's central premise – that the facilities are in fact under common control. As a result, the EPA finds that the Petitioner demonstrated that the DEC did not provide an adequate record explaining its determination that the Seneca Energy Facility and the landfill are two separate sources. Specifically, the DEC did not provide an adequate record explaining its analysis on the common control element.

In responding to this Order, the DEC is directed to explain, on the record, what case-specific facts and factors it considered as part of its source determination analysis regarding the two facilities. In particular, the DEC should explain how its identification and treatment of the relevant facts and circumstances in this case are consistent with the Declaratory Ruling, as well as with any other applicable legal requirements or EPA guidance and determinations upon which the DEC relied. Specifically, the record should include sufficient detail to explain the DEC's evaluation of common control. That explanation should address the extent to which the DEC considers the locating of one entity on another entity's property as a relevant factor in determining whether a common control relationship exists.

In responding to this Order and identifying the case-specific factors salient to the DEC's source determination analysis, the EPA appreciates that the DEC may conclude that the two facilities should be treated as a single source for CAA purposes. In that event, in addition to revisions to the permit record(s), the title V permit(s) for the two facilities would need to be revised as well. Additionally, if upon further review the DEC determines that the Seneca Energy Facility and the landfill are under common control, it must also provide a record of whether their combined emissions qualify as a PSD major stationary source and a title V major source and for which pollutants. Further, if the DEC determines that the Seneca Energy Facility and the Ontario County Landfill are a single title V major source, it must revise the Seneca Energy Facility's

Title V Permit accordingly. Finally, if the DEC determines that the Seneca Energy Facility and the Ontario County Landfill are a PSD major stationary source, it must revise the Seneca Energy Facility's Title V Permit to include any applicable PSD requirements. In reviewing the source determination, the DEC is directed to explain how its common control analysis is influenced by the specific facts brought to its attention by the Petitioner regarding common control, which the Petitioner (then a commenter) had grouped under general headings of considerations potentially relevant to the DEC's common control analysis. In so doing, the DEC should also explain its reliance on any other considerations outlined in the Declaratory Ruling. The DEC, as the relevant permitting authority, may exercise reasonable discretion when making common control determinations in accordance with applicable legal requirements. In exercising its discretion and explaining its decision-making, the DEC may find EPA guidance and prior determinations to be helpful – particularly those pertaining to landfills and their companion energy facilities.

For the foregoing reasons, I grant the Petitioner's request for an objection to the permit on this claim, and direct the DEC to provide an adequate record sufficient to support a source determination regarding the Seneca Energy Facility and the Ontario County Landfill.

**Claim 2. Issues Raised on Pages 21–22 Under the Heading "Sham Permit."**

***Petitioner's Claim.*** On pages 21–22 of the Petition, the Petitioner appears to reiterate the primary issue already discussed in Claim 1 and adds that:

> when a source intends to operate at major source levels but has accepted operational limitations in order to obtain a minor source permit, the permit is a sham and void ab initio, requiring the source to obtain a major source permit prior to constructing or operating.

Petition at 21.

***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 21–22 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 Seneca Energy Facility and the landfill. Thus, to the extent that the issues summarized above overlap with Claim 1, the EPA considers them responded to as part of the grant issued on Claim 1. Notably, as a result of the grant on Claim 1, there will be further activity regarding the permit on which this Petition is based, including the issuance (at a minimum) of a new proposed permit to the EPA for a 45-day review period. The post-order permit processing is also discussed previously in Section II.B of this Order.

If in fact there are any remaining issues not overlapping with Claim 1 included on pages 21 and 22 of the Petition, these were not raised with reasonable specificity during the public comment

period, as required by CAA § 505(b)(2) and 40 C.F.R. § 70.8(d).[35] 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. *In the Matter of Luminant Generation Company*, Order on Petition Nos. VI-2014-01; VI-2014-02; VI-2014-03 (January 2, 2015) at 7.

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 grant in part and deny in part the 2012 Petition as described above.

Dated: June 29, 2015

Gina McCarthy
Administrator

[35] 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 DEC 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.