

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

In the Matter of the Application of

SENECA LAKE GUARDIAN,

Plaintiff-Petitioner,

For a Judgment Under Article 78 of the Civil Practice
Law and Rules,

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
COUNTY LINE MRF, LLC,

Defendants-Respondents.

Index No. _____

Oral Argument Requested

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED PETITION AND COMPLAINT**

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PRELIMINARY STATEMENT

Petitioner Seneca Lake Guardian brings this Article 78 proceeding to challenge the New York State Department of Environmental Conservation's issuance of a Part 360 permit allowing the construction and operation of the County Line Materials Recovery Facility ("the Permit"). Petitioner Seneca Lake Guardian, a non-profit environmental organization, challenges the Permit because Respondent Department of Environmental Conservation ("DEC") failed to require Respondent County Line MRF ("County Line") to follow permitting rules that are designed to protect local water quality from the risks a new solid waste facility presents. Specifically, DEC failed to take steps necessary to ensure that leachate from the planned facility will not introduce a harmful group of chemicals, PFAS, into Cayuga Lake, which is the drinking water source for members of Seneca Lake Guardian and where members swim, fish, and kayak.

The Permit allows County Line to build and operate a solid waste facility in Cayuta, New York. The facility would generate 80 gallons of leachate daily. Based on the types of waste the facility plans to accept, it is likely that its leachate will be contaminated with per- and polyfluoroalkyl substances, otherwise known as PFAS or "forever chemicals."¹

New York's solid waste rules contain a number of requirements that applicants must meet in order to reduce the risk of harm from the proposed facility. Several of the application requirements are safeguards to avoid these risks. County Line's application for a permit failed to include all the information necessary to demonstrate that the facility had a plan to safely dispose of its leachate. First, County Line failed to detail in its application "authorized locations where

¹ Because the facility is not yet operating, Petitioners cannot provide evidence showing PFAS in the leachate. Exhibit 14 demonstrates that DEC did not obtain a characterization of the waste stream but was aware that it is likely to contain PFAS. *See infra* at 6–7.

wastes, including residues, are transported when they leave the facility and what arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the waste.” 6 NYCRR § 360.16(c)(4)(i)(c). County Line asserts that it will send its leachate to the Ithaca Area Wastewater Treatment Facility, but the Ithaca Area Wastewater Treatment Facility has not received a request from County Line to accept the leachate, nor has it agreed to accept the leachate. Second, the application failed to demonstrate that County Line can “operate the facility in a manner that ... does not allow any leachate to enter surface waters or groundwater except under authority of a State Pollutant Discharge Elimination System permit.” *Id.* § 360.19(b)(2). The Ithaca Area Wastewater Treatment Facility does not have the technology to remove PFAS from wastewater and its State Pollutant Discharge Elimination System permit does not allow the facility to discharge PFAS into Cayuga Lake. If the Ithaca Area Wastewater Treatment Facility accepted PFAS-containing leachate from County Line, PFAS would pass through the Ithaca Wastewater Treatment Facility untreated and enter Cayuga Lake, in violation of the Ithaca Area Wastewater Treatment Facility’s State Pollution Discharge Elimination System permit and the Clean Water Act.

Although County Line failed to provide legally required information in its application meant to safeguard local waterways and communities from leachate pollution, DEC issued the Permit. DEC also failed to consider the impact of the proposed facility on Seneca Lake Guardian’s members’ rights to clean water and a healthful environment under N.Y. Const., Art. 1, § 19. For these reasons, DEC’s Permit issuance was arbitrary, capricious and in violation of law. Seneca Lake Guardian asks this Court to vacate the Permit and remand the Permit to DEC.

FACTUAL BACKGROUND

On August 11, 2020, County Line² applied to DEC for a solid waste facility permit under Part 360 of the New York Codes, Rules and Regulations.³ County Line proposed to build and operate a waste transfer facility in Cayuta, New York that would accept municipal solid waste, construction and demolition debris, and source-separated recyclables. Seneca Lake Guardian submitted comments on the application on September 24, 2020. Exhibit 6.⁴ DEC provided comments to the applicant and requested additional information. On March 19, 2021, County Line resubmitted its application with some revisions and additional technical information purportedly responsive to DEC's comments. Exhibit 7.⁵

According to County Line's March 19, 2021 application, the facility will handle 500 tons of waste per day and generate approximately 80 gallons of leachate per day. Exhibit 7 at 8.⁶ Trucks will arrive at the facility and, after screening to ensure that no prohibited wastes are

² The initial application listed Alternative Waste Services as the applicant and operator. The March 2021 application includes an attestation by County Line's principal that County Line MRF is the entity legally responsible for the permit. The subsequent application listed County Line MRF, LLC and the permit was issued to County Line MRF, LLC.

³ Based on a letter included with the August 11, 2020 application referencing comments provided by DEC to the applicant on June 23, 2020, it appears that the August application is a revision to an earlier application. However, Petitioners have not been provided with that earlier application.

⁴ All exhibits referenced herein refer to the exhibits annexed to the Verified Petition/Complaint, which are identified and verified in the Affirmation of Susan J. Kraham.

⁵ Exhibit 7 is a combined PDF of County Line's March 19, 2021 application. The application was provided to Petitioner in 4 parts with separately paginated sections. Petitioner has inserted page numbers for the combined document in the lower right margin and references to the Exhibit will use those page numbers.

⁶ The application states that the facility will produce 80 gallons of "liquid waste" per day. This number does not appear to include the amount of wastewater the facility will generate from employees and visitors flushing toilets and using sinks, which is generally estimated at around 7–16 gallons per person per day in a commercial facility. *See Commercial Septic Tank & Drainfield Design Size Requirements*, InspectAPedia, https://inspectapedia.com/septic/Commercial_Septics.php (last accessed Oct. 12, 2022).

present, “[l]oads of waste will be delivered to the building and dumped on the concrete floor.” *Id.* at 24. Drains in the loading bay floor will convey liquids to a holding tank. *Id.* Materials such as plastic, metal, and tires “will be placed in 30-yard roll-off containers outside the facility.” *Id.* at 27. When rain “does enter the [roll-off] container[s], leachate may be drained within the trailer way to the approved holding tank for... disposal.” *Id.* at 35. The liquids in the holding tank “will be pumped by Clean Earth Septic Service LLC and taken to Tompkins County Water Treatment.” *Id.* at 24. The remaining waste will be transferred to trailers for disposal at an approved landfill or other location. *Id.* The application also describes a 1,000-gallon septic tank to hold wastewater—liquid waste produced from toilets and sinks. *Id.* at 94, 96.

Municipal waste and construction and demolition debris commonly include per- and polyfluoroalkyl substances-based products.⁷ Per- and polyfluoroalkyl substances, also known as PFAS or “forever chemicals,” represent a large class of man-made chemicals⁸ known to be hazardous to human health.⁹ Disposal of waste is a major pathway for PFAS discharges into

⁷ Env'tl. Working Grp., *Feeding the Waste Cycle: How PFAS 'Disposal' Perpetuates Contamination* (Aug. 18, 2020) <https://www.ewg.org/news-insights/news/feeding-waste-cycle-how-pfas-disposal-perpetuates-contamination> (“Municipal solid waste includes a mixture of PFAS-containing consumer items, such as food packaging materials, food wares, stain- and water-resistant upholstery, textiles, clothes and carpets either treated or manufactured with PFAS. PFAS are also present in construction and demolition wastes.”).

⁸ See DEC, *PFAS in Food Packaging*, <https://www.dec.ny.gov/chemical/124367.html> (last accessed Oct. 10, 2022).

⁹ New York has acknowledged the link between PFOS exposure and “increased risk for several health effects, including increases in total serum cholesterol, triglycerides, and uric acid, altered immune response, and effects on reproduction and development.” N.Y. Dep’t of Health, Proposed Amendment of 10 NYCRR § 5-1.52 (Maximum Contaminant Levels (MCLs)) at 22 (July 24, 2019), <https://regs.health.ny.gov/sites/default/files/proposed-regulations/Maximum%20Contaminant%20Levels%20%28MCLs%29.pdf>. See also Agency for Toxic Substances & Disease Registry, U.S. Dep’t of Health & Human Servs., *Toxicological Profile for Perfluoroalkyls* (May 2021), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf>.

drinking water and may create “repeated cycles of contamination.”¹⁰ Studies have found PFAS in leachate,¹¹ while recent research reveals that several different types of PFAS and precursors have been found in waste transfer vehicles.¹² Studies also show that landfill leachate contributes to PFAS in municipal wastewater.¹³

PFAS is prevalent in the leachate of facilities that handle municipal solid waste and construction and demolition debris.¹⁴ County Line’s application indicates that the facility will accept these types of waste and that the leachate from these wastes will be transported to wastewater facilities. Wastewater treatment facilities in New York have not installed the technology necessary to remove PFAS from wastewater before discharging it into surface waters.¹⁵

On April 23, 2021, Seneca Lake Guardian submitted comments on the revised application. Exhibit 11. Seneca Lake Guardian’s comments raised significant concerns about

¹⁰ Tasha Stoiber, Sydney Evans & Olga V. Naidenko, Env’tl. Working Grp., *Disposal of Products and Materials Containing PFAS: A Cyclical Problem*, 260 *Chemosphere* 127659 (Dec. 2020), <https://doi.org/10.1016/j.chemosphere.2020.127659>.

¹¹ Jason R. Masoner et al., *Landfill Leachate Contributes Per-/Poly-Fluoroalkyl Substances (PFAS) and Pharmaceuticals to Municipal Wastewater*, 6 *Env’tl. Science: Water Research & Tech.* 1300, 1301 (2020), <https://doi.org/10.1039/D0EW00045K> (“[L]eachate has been reported to contain substantially elevated concentrations of organic chemicals, such as PFAS . . .”).

¹² See Yalan Liu et al., *From Waste Collection Vehicles to Landfills: Indication of Per- and Polyfluoroalkyl Substance (PFAS) Transformation*, 8 *Env’tl. Science & Tech. Letters* 66 (2020), <https://doi.org/10.1021/acs.estlett.0c00819>.

¹³ Masoner, *supra* note 11.

¹⁴ See Helena M. Solo-Gabriele et al., *Waste Type, Incineration, and Aeration Are Associated with Per- and Polyfluoroalkyl Levels in Landfill Leachates*, 107 *Waste Mgt.* 191 (2020), <https://doi.org/10.1016/j.wasman.2020.03.034>.

¹⁵ Effective treatments to remove PFAS from water include anion exchange resin, high pressure membranes, and granulated activated carbon. See Thomas Speth, EPA, *PFAS Treatment in Drinking Water and Wastewater—State of the Science* (Sept. 16, 2020), https://www.epa.gov/sites/default/files/2020-09/documents/r1-pfas_webinar_day_1_session_3_speth.pdf.

the leachate generated at the facility and the plan for its disposal. Seneca Lake Guardian urged DEC to take appropriate steps to ensure that PFAS-containing leachate from the proposed facility does not make its way into local waters. Seneca Lake Guardian based its concerns in the legal framework of the federal Clean Water Act, the New York State Environmental Conservation Law, and New York’s solid waste regulations. Specifically, Seneca Lake Guardian commented that DEC “should prohibit the proposed facility from hauling PFAS-containing leachate to a wastewater treatment facility.” *Id.* at 2. Seneca Lake Guardian also asked DEC to “reject the application because it fails to identify a wastewater treatment facility or waste hauler authorized to dispose of its leachate.” *Id.* at 4.

After Seneca Lake Guardian submitted its comments, County Line submitted to DEC an update to its application stating: “Process water will be pumped by Clean Earth Septic Service LLC and taken to Ithaca Area Wastewater Treatment, or the nearest acceptable alternative should the primary destination be closed, ex. Chemung County Wastewater treatment plant.” Exhibit 12. County Line did not include any additional information regarding the arrangements or verifying that Ithaca, Chemung, or any other wastewater treatment facility would accept its leachate. Indeed, in a statement to the Ithaca Voice, the Ithaca Area Wastewater Treatment Facility made clear that County Line never even inquired as to its capacity to accept County Line’s leachate. Exhibit 13.

Sometime in the late summer or early fall of 2021, Matthew Russo, a Water Division engineer from DEC, asked Ed Gottlieb, the Industrial Pretreatment Coordinator at the Ithaca Area Wastewater Treatment Facility, whether County Line had sought authorization from Ithaca Area Wastewater Treatment Facility to send waste for treatment. *See* Exhibit 14. Mr. Gottlieb told Mr. Russo that County Line had not contacted the Ithaca Area Wastewater Treatment

Facility. About a year later, on September 16, 2022, Mr. Russo again asked Mr. Gottlieb whether County Line had reached out. Mr. Gottlieb again informed Mr. Russo that County Line had not. *Id.* In addition to asking whether County Line had sought authorization, Mr. Russo wrote, “I realize PFAS is a challenging issue right now and [Ithaca Area Wastewater Treatment Facility] may or may not be requesting PFAS analytical information from industrial users/waste haulers. If you do have any (not just PFAS) anticipated or actual wastewater sampling information, could you please pass this along to us?” *Id.*

Like other wastewater treatment facilities in New York, neither the Ithaca nor the Chemung facility has the technology to remove PFAS from wastewater before discharging it into surface waters. In addition, neither of these facilities is authorized to discharge PFAS into surface waters. *See* Exhibit 15 (State Pollution Discharge Elimination System Permit for Ithaca Area Wastewater Treatment Facility); Exhibit 16 (State Pollution Discharge Elimination System Permit for Chemung Co Elmira Sewer District—Baker Road Wastewater Treatment Plant). The Ithaca Wastewater Treatment Facility discharges to Cayuga Lake, which is a drinking water source for approximately 35,000 people. The Chemung County wastewater treatment facility discharges to the Chemung River, which is also a drinking water source. Exhibit 16 (indicating Chemung River as an “A” class water). On June 15, 2022, DEC issued Solid Waste Management Permit No. 8-4422-00051/00001 to County Line. Exhibit 1. DEC also issued a Responsiveness Summary on June 15, 2022. Exhibit 17. The Responsiveness Summary does not directly respond to any of Seneca Lake Guardian’s concerns or its two requests—that DEC not allow the proposed facility to haul PFAS-containing leachate to a wastewater treatment facility and that DEC deny the application for failure to identify a facility or hauler who could safely haul and dispose of the leachate. *See* Exhibits 6, 11.

The Responsiveness Summary includes this statement: “The comments received expressed concerns about PFAS... that may present in runoff or the working floor from the facility escaping, and the concomitant potential for impacts to surface waters and/or groundwater.” Exhibit 17 at 2. The Responsiveness Summary also confirmed that the “contents of the holding tank are to be periodically hauled offsite by Clean Earth Septic Service LLC and taken to Ithaca Area Wastewater Treatment, or the Chemung County Wastewater treatment plant should the Ithaca Area plant be closed.” *Id.* DEC added that “staff from the DEC, from Hornell District Office of the New York State Department of Health, and from the Schuyler County Watershed Protection Agency either approved or found no concerns with the proposed designs.” *Id.*

LEGAL BACKGROUND

I. STANDARD OF REVIEW

This Court reviews the decision of an administrative body under Article 78 of the CPLR to determine “whether [a] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR §§ 7803(1), (3). An action is arbitrary and capricious when “it is taken without sound basis in reason or regard to the facts.” *Matter of Newman v. City of Tonawanda*, 206 A.D.3d 1701, 1702 (4th Dept. 2022) (quoting *Matter of Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013)).

II. STANDING

Seneca Lake Guardian has standing to bring this Article 78 proceeding. In order to establish standing, an organization must show that: “one or more of its members would have standing to sue, that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests, and that neither the asserted claim

nor the appropriate relief requires the participation of the individual members.” *Matter of Finger Lakes Zero Waste Coalition, Inc. v. Martens*, 95 A.D.3d 1420, 1421 (3d Dept. 2012) (citing *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 775 (1991)). In cases involving environmental harm, an organization can establish standing by alleging that the agency action will harm the organization’s members in their use and enjoyment of natural resources. *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*, 13 N.Y.3d 297, 304–305 (2009). While the harm alleged to individual members must be “different in kind or degree from the public at large . . . it need not be unique.” *Matter of Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 311 (2015) (citation omitted).

Seneca Lake Guardian clearly meets that burden. Seneca Lake Guardian is a non-profit environmental organization whose mission is to preserve and protect the health of the Finger Lakes and its environment for its residents and visitors. Exhibit 2 (Taylor Aff.). Seneca Lake Guardian is a Waterkeeper Alliance Affiliate. *Id.* ¶ 4. Petitioner’s members live throughout the Finger Lakes Region. *Id.* ¶ 3. Many Seneca Lake Guardian members get their drinking water from Cayuga Lake and swim, kayak, fish and otherwise recreate in the lake. *Id.* Seneca Lake Guardian also has members who live at the lake and draw their drinking water directly through beach wells. *See, e.g.*, Exhibits 3–5. Members whose drinking water comes from Cayuga Lake and those who recreate in Cayuga Lake are worried that the wastewater from the County Line Facility will have PFAS in it and that because the Ithaca Area Wastewater Treatment Facility does not remove PFAS from the water, their drinking water and recreation areas will pose a threat to their health. Exhibit 2 (Taylor Aff. ¶ 10–11).

Several members of Seneca Lake Guardian have standing to sue because they have been injured by DEC granting the permit, their interests in protecting water resources are germane to

their purpose as an organization, and there is no need for individual participation in this challenge.

To show they have standing to bring a claim, an individual must “establish both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated.” *Matter of Village of Woodbury v. Seggos*, 154 A.D.3d 1256, 1258 (3d Dept. 2017) (quoting *Matter of Assn. for a Better Long Is., Inc. v. New York State Dept. of Env'tl. Conservation*, 23 N.Y.3d 1, 6 (2014)).

Mitchell Lavine is a member of Seneca Lake Guardian. Exhibit 3 (Lavine Aff.). He has had a long career in environmental research and planning including three advanced degrees from Cornell University. *Id.* ¶ 4. At one time in his career, he did water resource planning for Tompkins County. *Id.* ¶ 5. He and his wife own two adjacent lake homes on Taughannock Boulevard in Ithaca. *Id.* ¶ 8. Mr. Lavine is very concerned about the proposed County Line facility because he is aware that its leachate likely will contain PFAS which, if accepted by the Ithaca Area Wastewater Treatment Facility, will be discharged into Cayuga Lake. *Id.* ¶ 9–11. His drinking water and household water all comes from Cayuga Lake through beach wells which essentially are holes in the ground a few feet from the lake shore. *Id.* ¶ 13–14. The water is filtered only through the ground. *Id.* ¶ 15. If PFAS is discharged into Cayuga Lake, his water will be unsafe to drink and to use for his home. *Id.* ¶ 16.

Jessica Wall is a member and the treasurer of Seneca Lake Guardian. Exhibit 4 (Wall Aff.). She has lived in the Ithaca area for most of her life. *Id.* ¶ 4–5. Ms. Wall lives in Lansing, where her drinking water comes from Cayuga Lake. *Id.* ¶ 3. She and her family also spend their summers on the lake, swimming and kayaking. *Id.* ¶ 9. Ms. Wall also waters her garden with water from the lake and her family eats what they grow. *Id.* ¶ 12. She is very concerned about

the impact on her health and her family's health if County Line is permitted to operate and send their leachate to Ithaca Area Wastewater Treatment Facility. *Id.* ¶ 11. Ms. Wall is aware that the treatment facility cannot remove PFAS from the leachate and is concerned that County Line's leachate will pass through the facility untreated and end up in her drinking water. *Id.* Ms. Wall is also quite concerned that her right to a clean and healthful environment, recently incorporated into the New York Constitution, is being ignored by the agency that is supposed to protect her water. *Id.* ¶ 13.

Vally Kovary is also a member of Seneca Lake Guardian. Exhibit 5 (Kovary Aff.). She has lived in her current home in Ithaca for the past 22 years and receives her water from the Bolton Point treatment plant, which draws water from Cayuga Lake. *Id.* ¶¶ 3, 5. Ms. Kovary regularly recreates at North Point Beach, Myers Park, and Long Point State Park, all along Cayuga Lake. *Id.* ¶ 8. Ms. Kovary is concerned about the safety and cleanliness of her drinking water and believes it is the government's job to protect water and public health and not allow discharge of contaminants into the water. *Id.* ¶¶ 10, 15.

This permit challenge does not require Ms. Wall, Ms. Kovary, or Mr. Lavine to participate. Seneca Lake Guardian is seeking injunctive and declaratory relief, which does not require individual participation in this challenge.

ARGUMENT

I. DEC'S ISSUANCE OF A PART 360 PERMIT TO COUNTY LINE SHOULD BE OVERTURNED BECAUSE COUNTY LINE FAILED TO MEET APPLICATION REQUIREMENTS TO PROVIDE SPECIFIC AND VERIFIED PLANS FOR ITS LEACHATE AND WASTEWATER.

A. New York Solid Waste Regulations Require Applicants to Provide Specific and Verified Plans for the Transport and Acceptance of Waste Leaving the Facility.

Under New York's solid waste regulations, an "application for a new permit must include, at a minimum," a facility manual, which must include the facility's waste control plan and its operations and maintenance plan. 6 NYCRR §§ 360.16(c)(4)(i), (ii). The waste control plan must identify "authorized locations where wastes, including residues, are transported when they leave the facility and what arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the waste." *Id.* § 360.16(c)(4)(i)(c). The application must also include an operations and maintenance plan, which must describe the "method and location used for disposal of the leachate." *Id.* § 360.16(c)(4)(ii)(e). The regulations define leachate as "any solid waste in the form of a liquid, including any suspended components, that results from contact with waste." *Id.* § 360.2(b)(157).

B. County Line's Application Failed to Provide Specific and Verified Plans for Disposal of the Facility's Leachate.

In its application, County Line indicated that the proposed facility would generate 80 gallons per day of liquid waste. Exhibit 7 at 8. County Line's application describes the liquid waste as "[l]eachate that will be collected by a double wall concrete holding tank and will be pumped based on a contractual agreement as needed." *Id.* There are at least two ways in which the facility will produce leachate—when rain percolates through materials stored in roll-off containers stored outside and when waste transfer vehicles tip waste on the concrete floor and

liquid wastes drain to a holding tank below the floor. Exhibit 7 at 24, 35.

County Line's explanation of the method and location for disposal of leachate is inadequate but also difficult to assess since it uses both the terms "leachate" and "process water" when addressing liquid waste. To the extent County Line was not using them interchangeably, the application offers only the following with respect to the disposal of leachate: "leachate may be drained within the trailer way to the approved holding tank for proper disposal." *Id.* at 35. This alone cannot meet the regulatory requirement that it include "a description of the drainage system used for the collection and storage of leachate and the method and location used for disposal of the leachate," in violation of 6 NYCRR § 360.16(c)(4)(ii)(e).

However, even if County Line used the terms interchangeably, it does not specify where the facility's leachate/process water would be safely and legally disposed or verify that either the hauler or the wastewater treatment facility had agreed to accept it as required by 6 NYCRR § 360.16(c)(4)(i)(c). The application states that "[p]rocess water will be pumped by Clean Earth Septic Service LLC and taken to Tompkins County Water Treatment." Exhibit 7 at 24. The application contains no indication that Clean Earth Septic Service LLC had agreed to haul the leachate or was authorized to do so. The application also contains no indication that "Tompkins County Water Treatment" is a facility that exists, let alone had agreed to accept County Line's leachate.

In comments submitted to the DEC on the permit application, Seneca Lake Guardian noted that there is no such facility as "Tompkins County Water Treatment." Exhibit 11 at 5. Seneca Lake Guardian also pointed out the failure of the application to verify that an identified entity would accept the waste as required by 6 NYCRR § 360.16(c)(4)(i)(c). *Id.*

After receiving comments from Seneca Lake Guardian, County Line gave DEC an updated version of that application page stating, “Process water will be pumped by Clean Earth Septic Service LLC and taken to Ithaca Area Wastewater Treatment, or the nearest acceptable alternative should the primary destination be closed, ex. Chemung County Wastewater treatment plant.” Exhibit 12.

County Line never provided information showing that the Ithaca Area Wastewater Treatment Facility, the Chemung wastewater treatment facility, or any other facility would or could accept the waste, or that Clean Earth Septic Service LLC would or could haul the waste.¹⁶ DEC was well aware of this failure. Their engineer had confirmed once in or about September 2021, before the permit was issued, and again a year later in September 2022, after the permit was issued, that County Line had not sought authorization from Ithaca Area Wastewater Treatment Facility to send its leachate for treatment. *See* Exhibit 14 (Emails between Ed Gottlieb, IAWWTF, and Matthew Russo, DEC (Sept. 16, 2022)). Further underscoring that failure, the Chair of the Ithaca Area Wastewater Treatment Facility Joint Committee commented in the press that County Line never applied to send its leachate to the Facility and the Facility never agreed to accept the waste. *See* Exhibit 13 (Jimmy Jordan, *Legal Challenge Looms Against DEC for Permitting Regional Waste Transfer Facility*, Ithaca Voice, Sept. 16, 2022).

Moreover, Clean Earth Septic Service LLC, the company County Line lists in its application as its leachate hauler, is not permitted to transport industrial waste to Ithaca or

¹⁶ Petitioner Seneca Lake Guardian submitted a Freedom of Information Law request seeking, with “regard to the County Line Materials Recycling Facility part 360 permit application and permit... the following: All correspondence between the applicant and DEC from the close of the public comment period until the issuance of the permit.” The verification information required by 6 NYCRR § 360.16(c)(4) was not included in the response.

Chemung wastewater treatment facilities. *See* Exhibit 8 (Email from Patti Leonardo, DEC, (Sept. 16, 2022)). At the time of County Line’s revised submission indicating that Clean Earth Septic Service would haul leachate to Ithaca, Chemung, or some other wastewater facility, Clean Earth Septic Service did not have the necessary permission to haul industrial discharge. *See* Exhibit 10 (Waste Hauler Permit No. HP-025). Clean Earth Septic Service’s permit to haul discharge to Ithaca Area Wastewater Treatment Facility expired in September 2021. *Id.* The hauling permit it held from DEC expired a month after the permit was issued and, despite the requirement to file an application to renew a permit within 30 days of the permit expiration, Clean Earth Septic Service did not file a timely permit renewal application. *See* 6 NYCRR § 364-4.3. Exhibit 9 (Waste Transporter Permit No. 8A-987).

County Line failed to satisfy the application requirements related to leachate in 6 NYCRR § 360.16(c)(4). It did not provide a waste control plan that conformed to the requirements designed to reduce the risk that the facility’s leachate would cause harm to local waters. County Line’s failure to identify the “method and location used for disposal of the leachate,” including “authorized locations” where leachate will be “transported when [it] leave[s] the facility” and demonstrate that “arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the” leachate puts local waterways—and residents at risk.

C. County Line’s Application Failed to Provide Specific and Verified Plans for the Facility’s Septic Wastewater.

In addition to leachate and/or process water from the waste transfer activities, the County Line facility will generate septic waste. Its application states that it would not use any existing wastewater treatment facilities and includes “septic system details” describing a 1,000-gallon septic tank. Exhibit 7 at 8, 90, 94. The application also indicates that “wastewater will be pumped out and disposed at a local wastewater treatment facility.” *Id.* at 24. The application

does not identify which “local wastewater treatment facility” County Line planned to send its wastewater to, nor does it verify that the facility has agreed to take its wastewater. County Line’s application fails to include a waste control plan that identifies “authorized locations” where wastewater will be transported when it leaves “the facility and what arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the waste.” 6 NYCRR § 360.16(c)(4)(i)(c).

D. DEC’s Failure to Require County Line to Submit Complete Information in Its Application Detailing Where It Would Take Its Wastewater and How It Would Manage Its Leachate Was Contrary to Law and Arbitrary and Capricious.

County Line failed to provide, and DEC failed to require, the necessary information to demonstrate:

- the “method and location used for disposal of the leachate,” 6 NYCRR § 360.16(c)(4)(ii)(e), and
- the “authorized locations where wastes, including residues, are transported when they leave the facility and what arrangements exist or will exist (contracts, etc.) that verify receiving entities will accept the waste,” 6 NYCRR § 360.16(c)(4)(i)(c).

DEC’s approval of the County Line facility and issuance of the Part 360 permit in the absence of compliance DEC’s regulations was arbitrary and capricious and contrary to law. An administrative agency’s rules, when “duly promulgated, are binding upon the agency” *Matter of Gilman v. New York State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144, 151 (2002) (quoting *Matter of Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982)); see *Matter of Blaize v. Klein*, 68 A.D.3d 759, 761 (2d Dept. 2009) (“It is a ‘fundamental administrative law principle that an agency’s rules and regulations promulgated pursuant to statutory authority are binding upon it’”) (quoting *Matter of Lehman v. Board of Educ. of City School Dist. of City of N.Y.*,

82 A.D.2d 832, 833–834 (2d Dept. 1981)). “An agency’s failure to follow its own procedures or rules in rendering a decision is arbitrary and capricious.” *Matter of D.F. v. Carrion*, 43 Misc. 3d 746, 756 (Sup. Ct., N.Y. County 2014). *See also Matter of Era Steel Constr. Corp. v. Egan*, 145 A.D.2d 795, 799 (3d Dept. 1988) (“An administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations.”) (citing *Frick*, 56 N.Y.2d at 778; *Matter of Grace Plaza of Great Neck v. Axelrod*, 121 A.D.2d 799, 801–802 (3d Dept. 1986)); *Matter of Epstein v. Valenti*, 97 A.D.2d 881, 881–882 (3d Dept. 1983)).

The Permit should be vacated.

II. COUNTY LINE’S PERMIT APPLICATION FAILED TO INCLUDE A LEGALLY SUFFICIENT PLAN TO DISPOSE OF ITS LEACHATE.

A. New York Solid Waste Regulations Require Applicants to Demonstrate in Their Application that the Facility’s Leachate Will Be Disposed of in Compliance with a State Pollution Discharge Elimination Permit.

New York’s solid waste regulations require every Part 360 permit application to include an operations and maintenance plan, which must include “a discussion of compliance with the operating requirements that are identified in section 360.19” 6 NYCRR

§ 360.16(c)(4)(ii)(l). Section 360.19 requires that the owner or operator of any facility must “operate the facility in a manner that . . . does not allow any leachate to enter surface waters or groundwater except under authority of a State Pollutant Discharge Elimination System permit.” *Id.* § 360.19(b)(2).

B. State Pollution Discharge Elimination System Permits and the Clean Water Act Restrict the Types of Pollution Wastewater Treatment Facilities May Lawfully Accept.

Congress passed the Clean Water Act in 1972 “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The Act protects all navigable waters of the United States, including surface waters that supply drinking water,

support fish and wildlife, and provide aesthetic and recreational opportunities for current and future generations of Americans. The Clean Water Act’s goal is to eliminate all discharges of pollution into navigable waters. *See id.* § 1251(a)(1). The Act prohibits discharges into waterways, except in compliance with a permit. *Id.* § 1311(a). The Act establishes the National Pollutant Discharge Elimination System to permit pollutant discharges to surface waters and authorizes states to develop and manage their own permitting program. *See id.* § 1342. A state permitting program must conform to the Clean Water Act’s requirements and regulations. *Id.* § 1342(b).

New York is authorized to administer and implement the Clean Water Act’s permitting program through the State Permit Discharge Elimination System permit program. ECL §§ 17-0801 *et seq.* State Pollutant Discharge Elimination System permits identify limits on the type and quantity of pollutants that may be discharged from a facility, 6 NYCRR § 750-1.11, and prohibit “the discharge of any pollutant not identified and authorized by such permit.” ECL § 17-0815(3). Clean Water Act regulations also prohibit an industrial facility from sending wastewater to a wastewater treatment facility if the wastewater contains pollutants that will “pass through” the wastewater treatment facility. 40 C.F.R § 403.5.

C. County Line Has Not Demonstrated that It Can Operate the Facility in a Manner that Ensures Its Leachate Is Discharged Only in Compliance with a State Pollutant Discharge Elimination System Permit.

County Line provided no information demonstrating that the Ithaca Area Wastewater Treatment Facility or the Chemung County wastewater treatment plant can lawfully accept the facility’s untreated leachate, which likely contains PFAS. On the contrary, neither the Ithaca Area Wastewater Treatment Facility nor the Chemung County wastewater treatment plant can lawfully accept PFAS-containing wastewater. Neither the Ithaca Area Wastewater Treatment

Facility nor the Chemung County wastewater treatment plant are authorized to discharge PFAS in their wastewater. *See* Exhibit 15 (State Pollutant Discharge Elimination System Permit for Ithaca Area Wastewater Treatment Facility); Exhibit 16 (State Pollutant Discharge Elimination System Permit for Chemung Co Elmira Sewer District—Baker Road Wastewater Treatment Plant). While the technology exists to remove PFAS from wastewater,¹⁷ neither the Ithaca Area Wastewater Treatment Facility nor the Chemung County wastewater treatment plant employ that technology at their facilities.

Because neither Ithaca Area Wastewater Treatment Facility nor Chemung County wastewater treatment plant remove PFAS from wastewater during their treatment process, any PFAS that enters the facility will pass through the facility into the receiving water—Cayuga Lake or the Chemung River—untreated. New York law prohibits “the discharge of any pollutant not identified and authorized by a State Pollutant Discharge Elimination System permit.” ECL § 17-0815(3). Since neither Ithaca Area Wastewater Treatment Facility nor Chemung County Wastewater treatment plant are authorized in their SPDES permits to discharge PFAS, any discharge of PFAS that passes through their facilities into the receiving waters would violate New York law as well as the Clean Water Act.

D. DEC’s Issuance of the Permit Without County Line Showing the Leachate Will Be Disposed in Compliance with a State Pollutant Discharge Elimination System Permit Was Contrary to Law and Arbitrary and Capricious.

DEC’s approval of the County Line facility and issuance of the Permit was contrary to law because County Line failed to provide the necessary information in its operations and maintenance plan to demonstrate that its leachate would only enter surface waters under the

¹⁷ *See supra* note 15.

authority of a State Pollutant Discharge Elimination System permit. Although Petitioner Seneca Lake Guardian raised these specific issues in their comments to County Line’s application, DEC failed to directly address them in either the permit or the Responsiveness Summary. DEC’s communication with the Ithaca Area Wastewater Treatment Facility confirms that it was aware of the need to characterize the waste and treat it accordingly. *See* Exhibit 14. Instead of requiring County Line to test its leachate for PFAS—and treat the leachate to remove PFAS before sending it to a wastewater treatment facility for disposal—DEC ignored the concerns and issued the Permit. DEC’s failure to address the shortcoming prior to issuing the Permit, despite Seneca Lake Guardian pointing out the problem, underscores how DEC’s issuance of the Permit was arbitrary and capricious.

III. DEC’S FAILURE TO CONSIDER THE IMPACTS OF THE COUNTY LINE FACILITY ON PETITIONER’S MEMBERS’ CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS.

Article 1, Section 19 of the New York Constitution, which became effective Jan 1, 2022—six months before DEC issued the Permit—guarantees that “[e]ach person shall have a right to clean air and water, and a healthful environment.” N.Y. Const., Art. 1, § 19. Seneca Lake Guardian, in its comments on County Line’s draft permit, raised concerns about the failure of the draft permit to adequately protect clean water. Specifically, Seneca Lake Guardian raised concerns that because the waste transfer station permit allows the facility to send untreated leachate that contains PFAS to the Ithaca Area Wastewater Treatment Facility, which also does not treat for PFAS, ultimately PFAS will end up in Cayuga Lake, a drinking water source. By failing to even consider the permit’s impact on clean water and failing to address or respond to these concerns in its responsiveness summary, DEC was derelict in its obligations under Article

1, Section 19 of the New York Constitution. Thus, DEC’s decision to issue the Permit is arbitrary and capricious.

The legislative history of the Environmental Rights Amendment demonstrates that it was motivated, at least in part, to protect people and the environment from under-regulated, yet highly toxic contaminants like PFAS getting into the water. The Statement of Justification for Assembly Bill A.1368 refers to “[r]ecent water contamination,” which “highlighted the importance of clean drinking water . . . as well as the need for additional protections.” Memorandum in Support of Legislation for 2021 Assembly Bill A.1368, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01368&term=&Summary=Y&Memo=Y. This was informed to a significant extent by the experiences of residents in Hoosick Falls and Newburgh, NY, where serious PFAS contamination of drinking water had been discovered and where remedies were limited by lax regulation of PFAS. These events were mentioned several times in legislative debates. As the lead sponsor of the legislation, Steven Englebright, stated in floor debate in 2018, “[T]here is a context of need to reassure the people of the State that this proposed constitutional amendment is intended to address. That need is defined in the newspapers almost every day: new contamination events, new threats to public health in places like Hoosick Falls and Newburgh” N.Y. State Assembly Floor Debate Transcript at 53 (Apr. 24, 2018), <https://www2.assembly.state.ny.us/write/upload/transcripts/2017/4-24-18.html#06279>.

These concerns are exactly what DEC failed to consider when issuing the Permit. Article 1, Section 19’s guarantee of clean air and clean water requires the agency to both consider the Permit’s potential impact on clean water and to take steps to ensure the right to clean water is protected. Here DEC did neither. DEC did not even insist on compliance with its own regulatory requirements, much less consider the impacts of this regulatory action on Seneca

Lake Guardian and other affected parties' right to clean water. *See supra* at 12–20. That failure is even more objectionable in light of the legitimate and well-founded concerns about threats to clean water raised in Petitioner's comments.

Nothing in the administrative record demonstrates that DEC ever considered the impact of issuing this permit on Petitioners' Constitutional right to clean water.

CONCLUSION

New York's solid waste regulations are designed to acknowledge potential threats that a new solid waste facility poses to a community and to manage these potential risks. DEC's decision to issue a permit to County Line without addressing the significant risks posed by the facility's leachate—even after Seneca Lake Guardian brought those risks to DEC's attention and requested that DEC address them, and even though DEC itself acknowledged that it had no characterization of the facility's waste—was arbitrary, capricious, and contrary to law. For this reason, Seneca Lake Guardian requests that the Court vacate the Permit and remand it to DEC.

Dated: October 13, 2022
New York, NY

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Memorandum of Law complies with the requirements of 22 NYCRR § 202.8-b. The document was prepared on a computer using Microsoft Word and is 6,711 words long (excluding the caption, table of contents, table of authorities, signature blocks, and this certificate), as computed by Microsoft Word.

Dated: October 13, 2022
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