

SUPREME COURT 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-

Index No. EF2022-
0533

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

Defendants-Respondents.

**DEC MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO DISMISS**

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PRELIMINARY STATEMENT

In this proceeding, a grass roots organization devoted to protecting the waters of the Finger Lakes seeks to invalidate a permit for a municipal solid waste processing facility located outside of the Finger Lakes watershed. Petitioner Seneca Lake Guardian lacks standing to maintain this challenge.

Seneca Lake Guardian has three members who get their drinking water from Cayuga Lake. They fear that the processing facility's wastewater, or leachate, will adversely affect their drinking water. One of the wastewater treatment facilities to which the processing facility may send leachate is in an entirely different watershed and could not reach Cayuga Lake. Indeed, Seneca Lake Guardian has not alleged that any of its members live *within 15 miles* of the processing facility or even in its watershed, making its claims of injury-in-fact too speculative to give rise to standing. And Seneca Lake Guardian has itself pleaded that the wastewater treatment plant that discharges to Cayuga Lake has already said that it will not accept leachate with the per- or polyfluoroalkyl substance [PFAS] levels that petitioner predicts. Further, New York has new, stringent regulatory standards for PFAS that apply to purveyors of drinking water.

Because none of its theories shows an injury-in-fact, Seneca Lake Guardian has failed to carry its burden of showing that it has standing to bring any of its four claims.

LEGAL BACKGROUND

DEC regulates waste management in New York State (*see* [ECL Article 27](#)). Its mandate includes preventing or reducing “water pollution” that is associated with the operation of waste management facilities ([ECL 27-0703](#)[2]). Accordingly, DEC must permit a solid waste management facility before any site preparation or construction may begin (*see* [ECL 27-0707](#)[1]). Municipal solid waste processing facilities like the one at issue here, which primarily perform post-collection separation and processing of waste to recover recyclables, are subject to this requirement (*see* [ECL 27-0701](#)[2]; [6 NYCRR § 360.2](#)[b][177]).

A permit application for a new waste processing facility must include a waste control plan ([6 NYCRR § 360.16](#)[c][4]) that specifies how the applicant plans to collect, store, and dispose of the wastewater that derives from the facility’s solid waste, which is technically referred to as “leachate” ([6 NYCRR § 360.2](#)[b][157]).¹ The waste control plan must describe an applicant’s plan for onsite leachate management, including detailing its systems for collecting and storing the leachate ([6 NYCRR § 360.16](#)[c][4][ii][e]).

¹ Solid waste sheds liquid due to the moisture content of the waste upon arrival at the facility.

When, as here, an applicant's plan entails taking the leachate offsite to a wastewater treatment facility, the applicant must identify authorized locations that might receive the leachate and disclose any existing or anticipated arrangements with such receiving facilities (*see* [6 NYCRR § 360.16\[c\]\[4\]\[i\]\[c\]](#)). Plans need not be formal or contractual at the time of application, particularly if the application is made to permit a facility that does not yet exist.² Nothing in DEC's regulations requires an applicant to commit at the application stage to the business relationships it will need to properly dispose of wastewater, and an entity's permit is not violated or invalidated if it ultimately uses a different properly authorized wastewater hauler or treatment facility. Nor does anything in DEC's regulations require a wastewater hauler or wastewater treatment facility that is identified in a permit application to provide its services to an applicant. There is no reason to require contractual arrangements months or even years in advance of the commencement of construction of a facility because DEC has ongoing enforcement authority to ensure that a permitted entity meets its legal

² An already permitted and operating facility that is seeking a permit renewal, in contrast, would likely have existing formalized agreements that are subject to disclosure (*id.* [§ 360.16\[c\]\[4\]\[i\]\[c\]](#)).

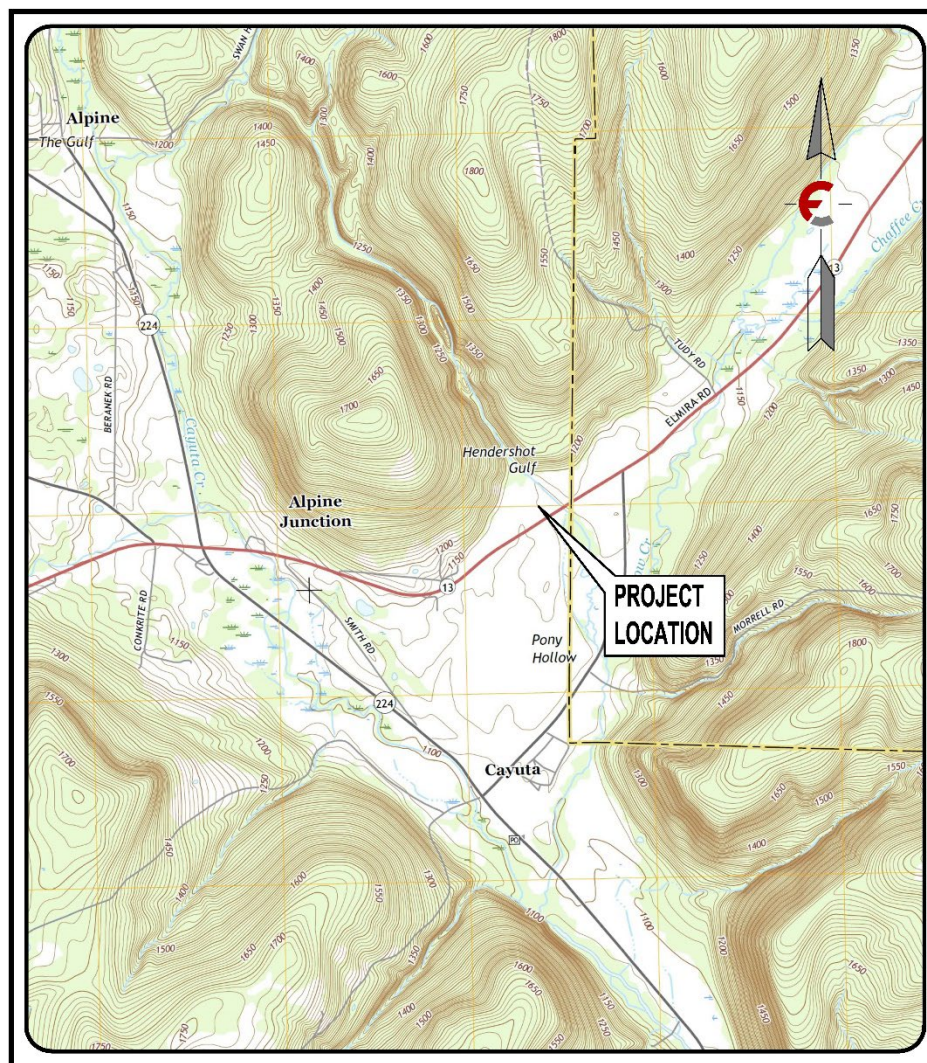
obligations in regard to the proper disposal of leachate and to all other facility operations. (*see, e.g.*, [6 NYCRR § 360.7](#).)

STATEMENT OF FACTS

In March 2021, co-respondent County Line MRF, LLC (County Line or the applicant) applied to DEC for a municipal solid waste processing facility permit for a facility that would, among other things, process municipal solid waste and recover recyclable materials. ([Kraham Aff. Ex. 7](#), at 2.) A DEC permit for a processing facility of this type does not allow the permanent disposal of any waste on the site.³ The applicant's processing facility was proposed at 1313 Recycle Lane, Cayuta, NY, some 12 miles southeast of Seneca Lake, one of the Finger Lakes. The proposed facility would be in Schuyler County, approximately one mile east of where NYS Route 13 and NYS Route 224 meet. (*Id.* at 55, 90.) Figure 1, below, is a project location map provided from the application.

³ A municipal solid waste processing facility is not a landfill. A processing facility promptly sorts materials and transfers them to appropriate locations (*see* [6 NYCRR § 362-2.3\[i\]](#)) [unprocessed municipal solid waste can be stored for no more than three days]; [6 NYCRR § 362-2.3\[j\]](#) [processed recyclables can only be stored for 60 calendar days, unless exceptional circumstances exist that extend the deadline to 180 days]). A landfill is where waste is taken for permanent disposal and where it degrades over long periods of time ([6 NYCRR § 360.2\[b\]\[152\]](#)).

Figure 1 (*Id.* at 90):

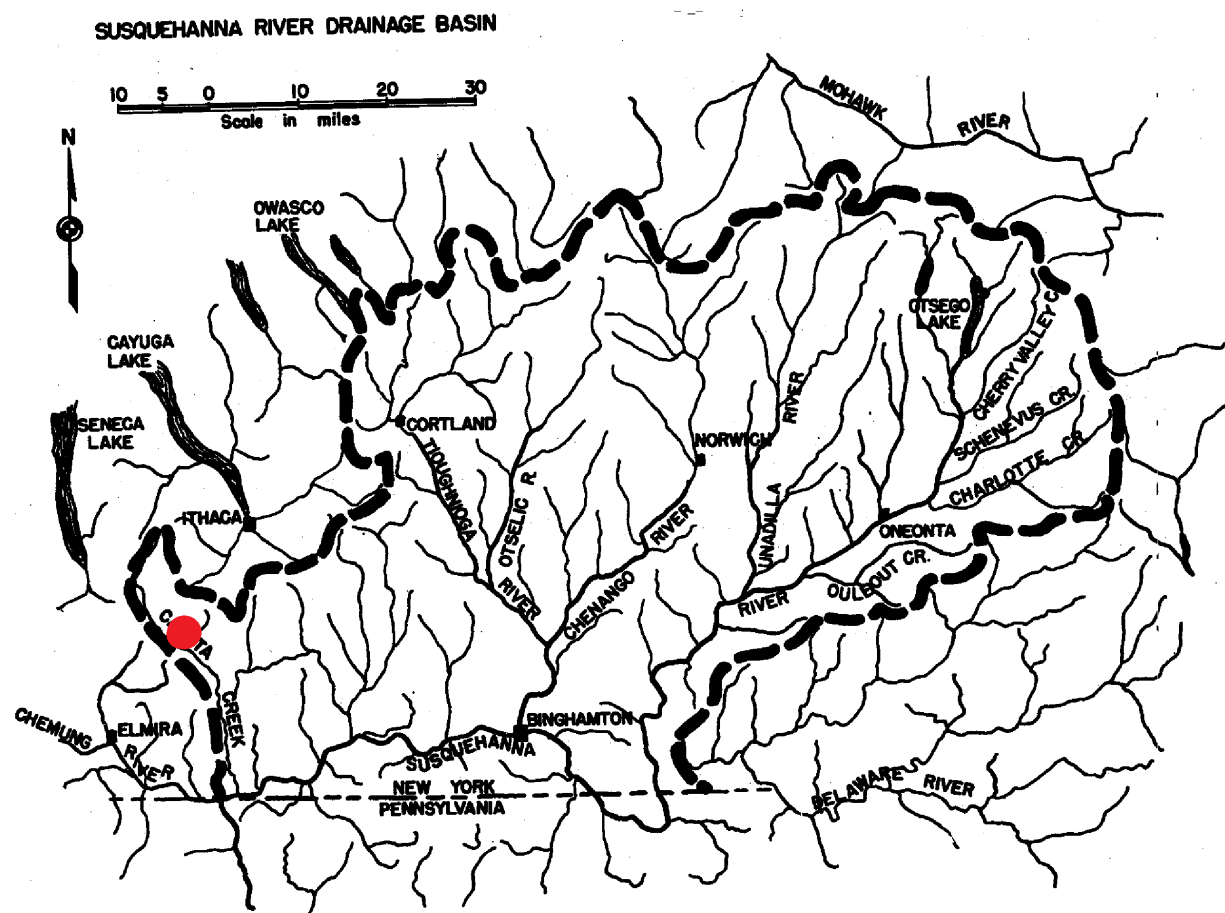


LOCATION MAP

The site is in the Susquehanna River drainage basin, *i.e.* the geographic area in which water naturally flows into the Susquehanna (*Id.* at 5, 17.) The Susquehanna River travels out of New York's southern border before eventually emptying into the Chesapeake Bay (*see generally* 6 NYCRR § 930.4).

New York's drainage basins are memorialized as maps in DEC regulations. A drainage basin, or watershed, is an area of land that drains into a specific body of water. Basins are separated by high elevation geographic features such as mountains, hills, or ridges. Figure 2, below, is [6 NYCRR § 931.5 Map 1](#), which depicts the Susquehanna River drainage basin with a red dot superimposed at the approximate location of the permitted waste processing site. The map shows that a high elevation feature separates the facility site from the Finger Lakes.

Figure 2 (6 NYCRR § 931.5 Map 1):

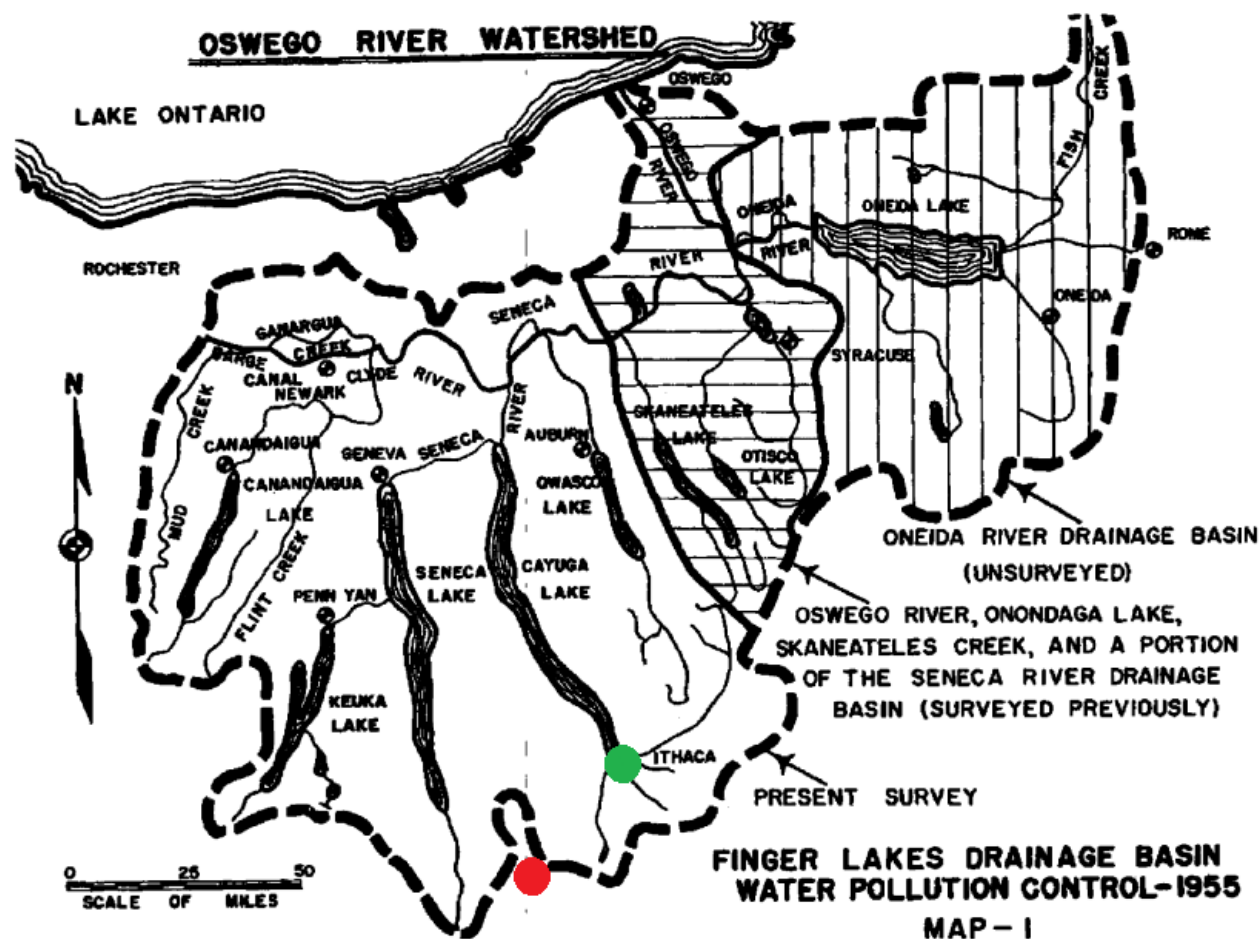


The applicant's waste control plan explained that the facility would be designed so that leachate is collected and drained into a holding tank outfitted with a high-level alarm that triggers once the level of liquid nears the top of the tank. ([Kraham Aff. Ex. 7](#) at 24.) The facility would generate an

average of 80 gallons of leachate a day.⁴ (*Id.*) A septic disposal service would pump the leachate from the tank at necessary intervals and deliver it to either the Ithaca Area Wastewater Treatment Facility or the Chemung County Wastewater Treatment Facility. (*Id.* at 4.) The Ithaca facility discharges treated wastewater into Cayuga Lake, one of the Finger Lakes (*Kraham Aff. Ex. 15*). Figure 3, below, is a map of the Finger Lakes drainage basin with a green dot superimposed at the approximate location of the Ithaca treatment facility and a red dot superimposed at the approximate location of the permitted waste processing facility. This map also shows the high elevation feature separating the waste processing facility from the Finger Lakes.

⁴ Contrary to petitioner's assumption (*MOL* at 4-5, nn 11-14 [referencing studies of landfill leachate]), the leachate generated by a waste processing facility is unlike the leachate generated by a landfill facility due to the fundamental differences between the facilities (*see* n 3, *supra*).

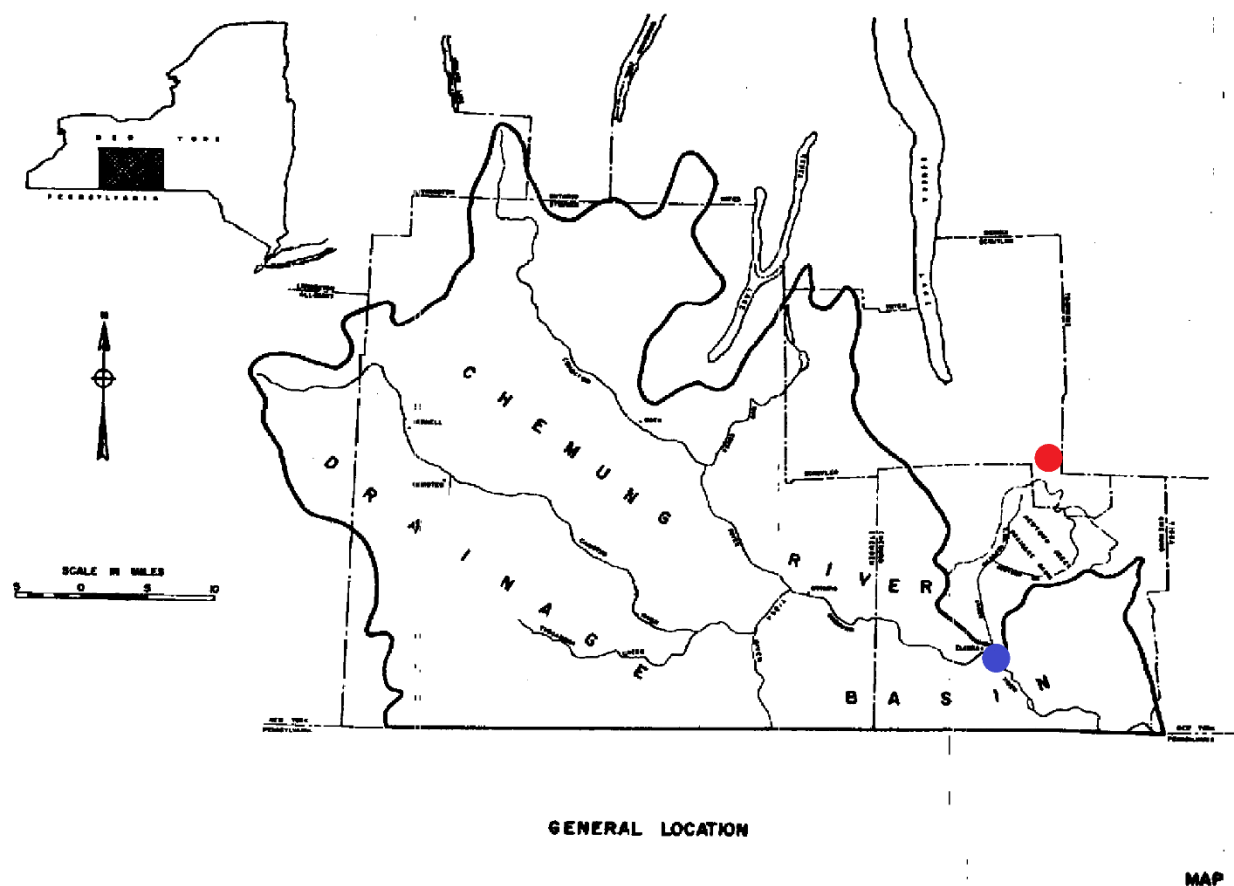
Figure 3 (6 NYCRR § 898.5 Map 1):



The Chemung treatment facility discharges treated wastewater to the Chemung River, which is not in the Finger Lakes drainage basin. ([Kraham Aff. Ex. 16](#).) Figure 4, below, depicts the Chemung River drainage basin with a blue dot superimposed at the approximate location of the Chemung treatment facility and a red dot superimposed at the approximate location of the permitted waste processing facility. This map shows a high elevation

feature that separates the Chemung treatment facility from the Finger Lakes.

Figure 4 (6 NYCRR § 811.7 Map 1):



In June 2022, DEC issued the applicant a solid waste management permit that authorized construction and operation of a municipal solid waste processing facility. ([Kraham Aff. Ex. 1](#).) After careful review, DEC found that the applicant's plans for capturing and storing leachate onsite and its plans for periodically trucking it to an appropriate wastewater treatment facility offsite were adequate and in compliance with all pertinent laws and

regulations. (*Id.*) DEC's permit is stricter than background regulations regarding how long recyclable materials can be stored, providing a 60 day maximum with no exceptions. (*Compare id. with 6 NYCRR § 362-2.3[j]*). The permit ensures that if County Line ever does violate the permit by impermissibly releasing leachate to soil or groundwater, the facility has a strict obligation to report the improper release to DEC within two hours of discovery to ensure prompt remediation. (*Kraham Aff. Ex. 1*, at 3.)

THIS LITIGATION

In October 2022, Seneca Lake Guardian commenced this hybrid CPLR Article 78 proceeding and declaratory judgment action challenging DEC's issuance of the permit.⁵ Petitioner is a New York State not-for-profit 501(c)(3) corporation formed “for the primary purpose of properly and appropriately preserving and using Seneca Lake and the Finger Lakes in a manner conducive to the environment and to the progress and general welfare of the communities around Seneca Lake and the Finger Lakes region” (Certificate of Incorporation *available at*

https://www.charitiesnys.com/RegistrySearch/show_details.jsp?id={5692D4A

⁵ Despite styling its papers to include a declaratory judgment cause of action, petitioner neither filed nor served a summons.

[E-2585-4249-A6F1-BB6D1002BB31](#)}).⁶ Petitioner was also formed to engage the public on “all matters relevant to Seneca Lake and its watershed” (*id.*). Its charity registration statement explains that petitioner solicits donations “to advocate to protect the lakes.” (*id.*). In this proceeding, petitioner describes its purpose as “to preserve and protect the health of the Finger Lakes and its environment for its residents and visitors.” ([Petition](#), at ¶ 5.)

Petitioner alleges that DEC erred in issuing the permit because the applicant did not identify an existing agreement from a waste control plant that was authorized to accept the applicant’s leachate (*Id.* at ¶¶ 94-102), because the applicant did not provide an adequate facility plan for the on-site disposal of leachate (*Id.* at ¶¶ 103-109), because the applicant did not adequately demonstrate that it could operate the facility without allowing leachate to enter surface or ground waters except where authorized by a State Pollutant Discharge Elimination System permit (*Id.* at ¶¶ 110-115), and because DEC failed to consider petitioner’s constitutional right to clean water and a healthful environment when it permitted a facility whose leachate may pass through a treatment plant and into water that petitioner’s

⁶ This Court may take judicial notice of the Department of State’s public records regarding petitioner’s organizational purpose (*see, e.g., Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667 [2d Dept 1989]).

members “recreate in, drink, and otherwise use.” (*Id.* at ¶¶ 116-120.)

Petitioner asks that the Court annul the permit. (*Id.* at 18.)

Petitioner alleges that it has standing to pursue the proceeding because its organizational mission is to protect the Finger Lakes, three of its affiant members drink water from Cayuga Lake and recreate in its waters, and those members “worr[y]” that, if the facility’s leachate travels to the Ithaca wastewater facility before being treated and discharged to the lake pursuant to the wastewater treatment facility’s State Pollutant Discharge Elimination System permit, Cayuga Lake’s waters will then “pose a threat” to their health. (*MOL*, at 8-11). In support of its petition, Seneca Lake Guardian relies on an attorney affidavit, a memorandum of law, four affidavits from members, and 17 exhibits. (*NYSCEF Dock.* Nos. 1-21.) The three member affidavits state that the respective members drink water from Cayuga Lake. (*See generally NYSCEF Dock.* Nos. 7-9.) They also establish that the member residing closest to the processing facility site lives 15 miles away. (*Kovary Aff.* at ¶ 3.)

ARGUMENT

Petitioner has not carried its burden to establish that it has standing to bring any of its causes of action. It has not pleaded non-speculative injury-in-fact with respect to any potential impacts to Cayuga Lake. And petitioner has

not alleged that any of its members live in the Chemung River or Susquehanna River drainage basins. Accordingly, DEC now moves to dismiss the petition.

PETITIONER LACKS STANDING

Petitioner fails to allege facts sufficient to establish its own standing or that of any of its individual members, which are both required. Seneca Lake Guardian's members cannot be harmed by wastewater handling activities in a watershed that is not the source of their drinking water. And, even if petitioner's members lived in the same drainage basin as the facility site—which they do not—petitioner's organizational purpose is not germane to protecting the watershed containing the site, as Seneca Lake Guardian is an organization with an expressly limited mission to protect the Finger Lakes Watershed.

Petitioner's members are “worried” ([MOL](#), at 9) that wastewater will be trucked into the Finger Lakes Watershed (*i.e.* to the Ithaca treatment facility), but nothing in the law requires that result and the Chair of the Ithaca treatment facility has publicly said that the facility will *not* accept leachate if, as petitioner speculates, it contains problematic levels of PFAS. Seneca Lake Guardian's members' concern that this harm may occur is insufficient for standing under clearly-settled law.

“Standing is ... a threshold requirement for a p[etitioner] seeking to challenge governmental action” (*New York State Assn of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; see also *Pataki v New York State Assembly*, 7 AD3d 74, 76 [3d Dept 2004] [injury-in-fact is necessary to confer standing to bring constitutional claim]). For a court to entertain a proceeding, a petitioner must establish an “injury in fact, meaning that plaintiff will actually be harmed by the challenged administrative [action]” (*Nurse Anesthetists*, 2 NY3D at 211). “The requirement of injury in fact for standing purposes is closely aligned with [the judiciary’s] policy not to render advisory opinions” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). The injury-in-fact rule “serves to define the proper role of the judiciary,” and derives from the “experience of centuries” that substantiates the belief that “a real controversy leads to sounder and more enduring judgments” (*id.* [internal quotation marks and citation omitted]).

“As the term [injury in fact] itself implies, the injury must be more than conjectural” (*Nurse Anesthetists*, 2 NY3d at 211). “To confer standing, a claimed injury may not depend upon speculation about what might occur in the future, but must consist of cognizable harm, meaning that a petitioner has been or will be injured” (*Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New York State Bd. of Elections*, 159 AD3d 1299, 1301 [3d Dept

2018] [internal quotation marks, brackets and citation omitted], *lv denied* 32 NY3d 912 [2019]). For this reason, when a court faces a scenario in which a party may “simply [choose] not [to] act in the fashion that [a] petitioner[] predicts,” that petitioner’s guess that the party will cause it future harm is found to be a “speculative scenario” insufficient for injury-in-fact (*Matter of Brunswick Smart Growth, Inc. v Town of Brunswick* 73 AD3d 1267, 1268-1269 [3d Dept 2010]).

An organizational petitioner, such as the one here, must also establish that at least one of its members would have standing to sue, and “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” (*Society of Plastics*, 77 NY2d 761, 775 [1991]).

“Although on a motion to dismiss [a petitioner’s] allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss” (see *Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

A. Discharges to Either the Chemung River or Susquehanna River Watersheds Could Not Injure Seneca Lake Guardian's Members

First, to the extent petitioner challenges the handling, treatment, and disposal of wastewater within the Susquehanna River Watershed or the Chemung River Watershed (*see e.g.*, [Petition](#) at ¶¶ 42, 56, 58, 60, 62), petitioner lacks standing because not one of petitioner's members alleges that those waterways (or any other source in those watersheds) are the source of their drinking water.

There are two ways leachate could enter drainage basins outside of the Finger Lakes basin: by a spill at County Line or if leachate were trucked from County Line to the Chemung County wastewater treatment plant. But in neither scenario can leachate reach petitioner's members' drinking water.

The proposed facility is located in Schuyler County and in the Susquehanna River drainage basin. Any liquids released at the site would naturally flow away from Cayuga Lake (*see* Figures 2 & 3, *supra*). Further, none of petitioner's affiants lives within 15 miles of the facility. Likewise, petitioner's members could not be injured if County Line were to truck the leachate to the Chemung County treatment facility, which is located in the Chemung River drainage basin. That facility discharges to the Chemung River, which flows to the Chesapeake Bay, not Cayuga Lake (*see* Figure 4,

supra). Petitioner has not carried its burden of showing standing to complain about discharges that could not impact its members' watershed or drinking water (see *Matter of New York State Bd. of Regents v State Univ. of N.Y.*, 178 AD3d 11, 18-19 [3d Dept 2019] [organizations lacked standing to challenge the regulations for schools where none of their members worked or had children that attended], *lv denied* 35 NY3d 912 [2019]).⁷

B. Petitioner's "Worry" that Wastewater Will be Discharged to Cayuga Lake is Conjecture Insufficient for Injury-in-Fact

Petitioner's argument that wastewater carrying PFAS could reach Cayuga Lake depends on the following speculative series of events occurring:

(1) the applicant will send leachate to the Ithaca treatment facility rather

⁷ Regardless of where petitioner's members live or the source of their drinking water, Seneca Lake Guardian's organizational purpose is to protect the Finger Lakes Watershed. Thus, to the extent that petitioner alleges that either the plan for on-site wastewater management or to transport leachate to the Chemung treatment facility are insufficient, the fact that both activities would take place outside of the Finger Lakes Watershed establishes that petitioner lacks an organizational purpose that could provide it standing for these complaints (see *Matter of Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting & the Env't.*, 199 AD3d 1310, 158 [4th Dept 2021], *appeal dismissed* 37 NY3d 1168 [2022]; see generally *Not-For-Profit Corporation Law* §§ 202(a) [a corporation's power is "subject to any limitations provided in . . . its certificate of incorporation"], 202(a)(2) [corporations only granted power to bring lawsuits "in furtherance of (the corporation's) corporate purposes"]).

than the Chemung treatment facility; (2) the Ithaca treatment facility will accept the leachate despite having already said that it would not if the leachate has the PFAS concentration levels that petitioner predicts; (3) the Ithaca treatment facility will not remove any PFAS before discharging the treated leachate into Cayuga Lake; and, finally, (4) the public water systems that certain petitioner members rely on for drinking water will not remove any PFAS before the members drink the water despite New York State's recently adopted drinking water standards that expressly limit PFAS. ([Pet.](#) at ¶¶ 5-8; *see* [10 NYCRR § 5-1.52](#), Table 3.)

Turning to just one of the layers of speculation built into Seneca Lake Guardian's theory, the concern that the applicant's facility will send wastewater to the Ithaca treatment facility is clearly conjectural. As Seneca Lake Guardian concedes, the Ithaca treatment facility has "never agreed to accept the waste[water]" from the applicant's facility.⁸ ([MOL](#), at 14). The Ithaca treatment facility is a third party that is uninterested in this litigation, and it has publicly said that petitioner's anxieties are unfounded.

⁸ Petitioner's related assertion that the Ithaca treatment facility was required to agree to accept the applicant's leachate before DEC could issue a permit has no basis in the language of the relevant regulations. (*Compare* [MOL](#), at 15, *with* [6 NYCRR § 360.16\[c\]\[4\]\[i\]\[c\]](#)).

The Chair of the Ithaca treatment facility explained to local press that petitioner’s fear “of the [facility] ejecting treated wastewater full of PFAS . . . into Cayuga Lake is not warranted.” (Kraham Aff. Ex. 13 at 2-3.) The Chair elaborated:

If the [Ithaca facility] were to treat waste transferred to it by County Line, it would only do so after testing it for its concentration of PFAS and other substances, and determining if the facility could treat that waste effectively. *Otherwise that waste would be turned away.* (*id.* at 4, emphasis added.)

Petitioner’s theory that it can allege an injury-in-fact based on its own prediction of what a third party will choose to do in the future is directly contrary to Third Department precedent. When the petitioners in *Matter of Brunswick Smart Growth, Inc. v Town of Brunswick* based their standing argument on a prediction of how a respondent would act in the future, the Court explained that the prediction was “a speculative scenario[]” and that the “respondent simply may not act in the fashion that [the] petitioners predict,” before concluding that the petitioners “fail[ed] to satisfy the elements of standing” (73 AD3d at 1268-1269). Petitioner’s theory fares far worse than the standing theory rejected in *Brunswick*: Unlike in *Brunswick*, petitioner’s prediction is about what a third party who is uninterested in this litigation will do, and that third party has *publicly stated that petitioner’s prediction is unfounded.*

Given the Chair’s statement that the Ithaca treatment facility will not accept the leachate if it contains the problematic PFAS levels that Seneca Lake Guardian predicts and the fact that the applicant listed a backup wastewater treatment facility that is outside the Finger Lakes Watershed, the alleged harm to petitioner’s members’ drinking water is clearly “speculation about what might occur in the future” that is insufficient for standing (*Brennan Ctr.*, 159 AD3d at 1301; see *Matter of Clean Water Advocates of N.Y., Inc. v New York State Dept. of Envtl. Conservation*, 103 AD3d 1006, 1007-1009 [3d Dept 2013] [speculative and conjectural allegations of future harm to water bodies are insufficient to establish standing], *lv denied* 21 NY3d 862 [2013]).

Petitioner’s worry about an intricate series of future events occurring—including a third party taking actions it has said it will not take—is far too speculative to establish injury-in-fact. Because petitioner has no causes of action that are based on allegations of non-conjectural harms that are germane to its organizational purpose, its petition should be dismissed for lack of standing (see *Clean Water Advocates*, 103 AD3d at 107-108; *Brunswick Smart Growth*, 73 AD3d at 1268-1269).


CONCLUSION

The petition should be dismissed in its entirety. If the Court denies this motion to dismiss, DEC requests 30 days after service of notice of entry to answer the petition and submit an administrative record and supporting affidavits (see [CPLR 7804\[e\]](#)).

Dated: February 24, 2023
Albany, New York

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Dated: February 24, 2023



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