CI2023-03956 Index # : EF2022-0533

SUPREME COURT
STATE OF NEW YORK COUNTY OF TOMPKINS

In the Matter of the Application of

SENECA LAKE GUARDIAN,

Plaintiff-Petitioner,

Index No. EF2022-0533

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

vs

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

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF COUNTY LINE MRF, LLC'S PRE-ANSWER MOTION TO DISMISS

WEAVER MANCUSO BRIGHTMAN PLLC
Attorneys for Defendant-Respondent
County Line MRF, LLC
150 Allens Creek Road, Suite 240
Rochester, New York 14618

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PRELIMINARY STATEMENT

Respondent County Line MRF, LLC (the "Applicant") submits this memorandum of law in support of its motion pursuant to CPLR 3211(a)(3) to dismiss the Verified Petition and Complaint (the "Petition")[1] filed by Petitioner Seneca Lake Guardian ("Petitioner"). Petitioner seeks to invalidate a solid waste management permit pursuant to 6 NYCRR Part 360 (the "Part 360 Permit") issued by Respondent New York State Department of Environmental Conservation ("NYSDEC") for the Applicant's facility located at 1313 Recycle Lane (a/k/a 6385 New York State Route 13) in the Town of Cayuta, Schuyler County, New York (the "Facility").

This proceeding should be dismissed because Petitioner lacks standing. Petitioner has not alleged any actual harm to its members related to on-site wastewater management, and cannot do so because Petitioner has not identified any member that lives closer than approximately 15 miles from the Facility or even within the same watershed. Petitioner has also not established that its members will suffer any direct harm related to its claims that wastewater allegedly containing "PFAS," if delivered and treated by the Ithaca Area Wastewater Treatment Facility, may be discharged into Cayuga Lake and impact drinking water and recreation. Not only are these claims based on multiple layers of conjecture that are devoid of evidentiary support, but Petitioner's vague allegations of harm to its members based on impacts to Cayuga Lake are no different in kind or degree from that of the general public. Because Petitioner has failed to allege facts establishing the existence of a specific injury-in-fact, the Petition should be dismissed.

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[1] Although styled as a "Verified Petition and Complaint," Petitioner did not serve a Summons as required for the commencement of a plenary action (*see* CPLR §§ 304[a], 305). Moreover, Petitioner's characterization of its claims is not controlling because the Court is empowered to "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Save the Pine Bush, Inc. v City of Albany*, 70 NY2d 193, 202 [1987]). Here, the Petition asserts claims challenging an administrative determination, which is properly reviewable in an Article 78 proceeding (*see* CPLR § 7803[3]; *see also* *Town of Marilla v Travis*, 151 AD3d 1588, 1590 [4th Dept 2017] [Article 78 proceeding seeking to annul determination by New York State Department of Environmental Conservation granting a Part 360 solid waste management permit]).

SUMMARY OF FACTS

The relevant facts and procedural history associated with this motion are more fully set forth in the NYSDEC's Memorandum of Law filed concurrently in support of the NYSDEC's motion to dismiss and will not be repeated here.

ARGUMENT

PETITIONER LACKS STANDING

This Court should dismiss the Petition without reaching the merits because Petitioner lacks standing. "[S]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review" (*Rudder v Pataki*, 246 AD2d 183, 185 [3d Dept 1998]; *affd* 93 NY2d 273 [1999]; *see also New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004] ["Standing is . . . a threshold requirement for a [petitioner] seeking to challenge governmental action."]). "To establish standing to challenge governmental action, the party asserting standing must show first, an injury-in-fact, and second, that the injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision" (*61 Crown Street, LLC v New York State Office of Parks, Recreation and Historic Preserve*., 207 AD3d 837, 839 [3d Dept 2022]).

Petitioner must also demonstrate organizational standing, which requires the following:

> [A] petitioner must show "that one or more of its members would have standing to sue; that the interests it asserts are germane to its purpose to such a degree as to satisfy the court that it is the appropriate representative of those interests; and 'that neither the asserted claim nor the appropriate relief requires the participation of the individual members'"

(*Cobbs Hill Vil. Tenants' Assn. by Sengbusch v City of Rochester*, 194 AD3d 1437, 1439 [4th Dept 2021], quoting *Niagara Preserve Coalition, Inc. v New York Power Auth*., 121 AD3d 1507, 1510 [4th Dept 2014]). Standing requirements "'are not mere pleading requirements but rather an

indispensable part of the plaintiff's case' and therefore 'each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof'" (*Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 306 [2009]).

Here, Petitioner alleges four causes of action all arising from the Applicant's management and disposal of wastewater. The second cause of action challenges the Applicant's plan for on-site wastewater management (*see* NYSCEF Doc. No. 1 at ¶¶103-109). The remaining three causes of action challenge the Applicant's plan for off-site disposal of wastewater at a wastewater treatment facility (*see* NYSCEF Doc. No. 1 at ¶¶94-102, 110-20). In either case, Petitioner has failed to meet its burden of demonstrating organizational standing with respect to its claims and, therefore, the Petition should be dismissed in its entirety.

A. Petitioner lacks standing to challenge the Applicant's on-site wastewater management.

1. Petitioner has not alleged that its members have sustained an injury-in-fact.

In deciding the issue of standing, this court "must first determine whether [P]etitioner, the party seeking relief, has sustained an injury" (*Brighton Residents Against Violence to Children, Inc. v MW Properties, LLC*, 304 AD2d 53, 56 [4th Dept 2003], citing *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-73 [1991]). As the Court of Appeals has held, "[t]he existence of an injury in fact — an actual legal stake in the matter being adjudicated — ensures that the party seeking review has some concrete interest in prosecuting the action" (*id.* at 56; *see also Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]). "Injury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury" (*Radow v Board of Appeals of Town of Hempstead*, 120 AD3d 502, 503 [2d Dept 2014], citing *Powers v De Groodt*, 43 AD3d 509, 513 [3d Dept 2007]).

Although Petitioner vaguely alleges that its members "live throughout the Finger Lakes Region" (NYSCEF Doc. No. 1 at ¶5), of the members actually identified, the closest to the Facility lives approximately 15-miles away.[2] Third Department precedent clearly establishes that this distance is insufficient as a matter of law to give rise to the presumption that Petitioner's members will be adversely affected by the Facility (*see* *Finger Lakes Zero Waste Coalition, Inc. v Martens*, 95 AD3d 1420, 1421-22 [3d Dept 2012] [no presumption at 4,000 feet]; *Powers*, 3 AD3d at 513 [no presumption at 4,700 feet]; *Gallahan v Planning Bd. of City Of Ithaca*, 307 AD2d 684, 685 [3d Dept 2003] [no presumption at 700 feet]; *Burns Pharm. of Rensselaer, Inc. v Conley*, 146 AD2d 842, 844 [3d Dept 1989] [no presumption at 1,000 feet]).[3]

In the absence of a presumption of injury, Petitioner is required to demonstrate an "actual and specific injury" (*61 Crown Street, LLC*, 207 AD3d at 840). Petitioner in this case has not articulated any injury arising from the on-site drainage system or the collection and storage of wastewater, let alone an actual and specific injury. Instead, Petitioner alleges that wastewater from the Facility, if delivered and treated by the Ithaca Area Wastewater Treatment Facility, may be discharged into Cayuga Lake and impact drinking water and recreation (*see* NYSCEF Doc. No. 1 at ¶¶5-8; *see also* NYSCEF Doc. Nos. 7, 8, 9). These allegations fail to establish Petitioner's standing because the Facility is in Schuyler County in the Susquehanna River watershed — not the Finger Lakes watershed. Thus, any release of wastewater at the Facility itself, which is pure speculation, would never flow directly into Cayuga Lake.

[2] The Facility is located at 6385 New York State Route 13 in the Town of Cayuta, Schuyler County, New York (NYSCEF Doc. No. 15). Mitchell J. Lavine owns property at 1499 and 1501 Taughannock Boulevard, Ithaca, New York, and resides in Dryden, New York (NYSCEF Doc. No. 7 at ¶8); Jessica Wall resides at 20 Old School Road, Lansing, New York (NYSCEF Doc. No. 8 at ¶3); and Vally Kovary resides at 101 Brook Lane, Ithaca, New York (NYSCEF Doc. No. 9 at ¶3). As the crow flies, the closest member resides approximately 15 miles from the Facility (*see* Mancuso Aff. Ex. A).

[3] Indeed, even assuming any of Petitioner's members actually reside in proximity to the Facility, that fact alone "is insufficient to confer standing where there are no zoning issues involved" (*61 Crown Street, LLC*, 207 AD3d at 840). This proceeding challenges the issuance of a Part 360 permit by NYSDEC, not a zoning determination.

2. Petitioner's alleged harm is not germane to its purpose.

Petitioner has also failed to establish the second prong of organizational standing because the allegations of injury arising from the Applicant's management of on-site wastewater is not germane to Petitioner's purpose. Petitioner's Certificate of Incorporation indicates it was formed essentially to protect Seneca Lake and the Finger Lakes watershed (*see* Mancuso Aff. Ex. B). As discussed, the Facility authorized by the Part 360 permit is located in Schuyler County and outside the Finger Lakes watershed. Thus, any wastewater, even if released at the Facility, would not flow into Cayuga Lake or any of the other Finger Lakes. To the extent Petitioner challenges actions based on alleged injuries to a watershed that Petitioner was not formed to protect, Petitioner's interests are not germane to the relief it seeks in this litigation (*see Rudder*, 93 NY2d at 279; *see also Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting and the Envt.*, 199 AD3d 1310, 1313 [4th Dept 2021], *aff'd* 37 NY3d 1168 [2022]).

B. Petitioner lacks standing to challenge the Applicant's off-site wastewater management because Petitioner's allegations are purely speculative and conjectural.

Petitioner lacks standing to pursue its other causes of action relating to off-site transportation, treatment, and disposal of wastewater because Petitioner's members have not "suffer[ed] direct harm, injury that is some way different from that of the public at large" (*Sierra Club v Village of Painted Post*, 26 NY3d 301, 310 [2015]; *accord Sierra Club v Town of North Castle*, 200 AD3d 694, 694 [2d Dept 2021]). Petitioner must demonstrate that its members "will suffer a concrete and identifiable injury, rising beyond mere conjecture or speculation . . ., and the injury-in-fact must be different in kind and degree from the community generally" (*61 Crown Street, LLC*, 207 AD3d at 839 [internal citations and quotations omitted]; *see also Hohman v Town of Poestenkill*, 179 AD3d 1172, 1175 [3d Dept 2020]; *Brummel v Town of North Hempstead Town Bd.*, 145 AD3d 880, 882 [2d Dept 2016]). Petitioner has not done so here.

Neither the Petition nor any of the Petitioner's affidavits articulate allegations of a ***specific*** injury-in-fact or a ***direct*** harm that Petitioner's members would suffer because of the NYSDEC's approval of the Applicant's Part 360 Permit, or the collection and storage of leachate at the Facility itself. As discussed, Petitioner alleges that its members may be injured because wastewater from the Facility, if transported to and accepted by the Ithaca Area Wastewater Treatment Facility, will then be inadequately treated and discharged into Cayuga Lake, from which some of Petitioner's members get their drinking water. Petitioner's alleged injuries to the quality of drinking water derived from Cayuga Lake due to the issuance of a permit for a facility in another county outside the Finger Lakes watershed is clearly an indirect consequence that is insufficient to adequately demonstrate a direct harm to Petitioner's members (*see* *Matter of Melrose Credit Union v City of New York*, 161 AD3d 742, 746 [2d Dept 2018]).

In a similar vein, Petitioner's allegations that its members will be injured by wastewater being trucked to a treatment plant where it will then be treated and discharged into Cayuga Lake rests on multiple layers of "speculation about what might occur in the future" (*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]). *First*, that the Facility's wastewater will have similar concentrations of PFAS that have been found in leachate collected from landfills, since "[t]he [F]acility will not accept industrial, medical, or hazardous waste, friable asbestos, liquids or septage, in addition to Part 360 unauthorized materials" (NYSCEF Doc. No. 11 [Exhibit 7 at p. 23]). *Second*, that all wastewater from the Facility will be transported and accepted by the Ithaca Area Wastewater Treatment Facility. Accepting Petitioner's allegations as true for purposes of the present motion, Petitioner alleges that it has not been verified whether the Ithaca Area Wastewater Treatment Facility will even accept the Facility's wastewater (*see* NYSCEF Doc. No. 1 at ¶¶41, 44).

Third, that the Facility's wastewater is the only wastewater accepted by the Ithaca Area Wastewater Treatment Facility that may contain PFAS. Petitioner alleges that the Facility will generate a maximum of 80 gallons of wastewater per day, but completely ignores that: (i) the Ithaca Area Wastewater Treatment Facility's average flow of treated sewage is approximately 6.5 million gallons per day; and (ii) the Ithaca Area Wastewater Treatment Facility accepts, along with wastewater from the City of Ithaca, Towns of Ithaca and Dryden, peak flows diverted from the Cayuga Heights Wastewater Treatment Plant, and trucked waste, including septage, landfill leachate, municipal sludge, alkaline hydrolysis liquid waste from the College of Veterinary Medicine, whey and other dairy processing wastes.[4] Petitioner has not alleged how any assumed levels of PFAS in the Facility's wastewater compare to other wastewater that the Ithaca Area Wastewater Treatment Facility currently receives or may receive in the future.

Fourth, Petitioner's allegations rest on speculation that the Ithaca Area Wastewater Treatment Facility will inadequately treat and discharge the Facility's wastewater (together with any other wastewater it receives) into Cayuga Lake at levels that violate applicable regulatory requirements or otherwise materially impact water quality. Petitioners have not alleged any factual basis for the proposition that the Applicant's wastewater, if treated by the Ithaca Area Wastewater Treatment Facility, would exceed regulatory limits for drinking water systems in New York State (*see* 10 NYCRR § 5-1.52, Table 3). Further adding to the levels of speculation upon which Petitioner's allegations are based, two of Petitioner's members reside at properties that are part of the Bolton Point Municipal Water System (*see* NYSCEF Doc. No. 9 at ¶5; *see generally* NYSCEF Doc. No. 8 at ¶3), which is itself further regulated under applicable federal and state requirements that limit the amounts of certain contaminants in water provided by public water systems.

[4] *See* https://www.cityofithaca.org/331/Wastewater-Treatment.

Simply put, "[t]enuous and ephemeral harm . . . is insufficient to trigger judicial intervention" (*Brunswick Smart Growth, Inc. v Town of Brunswick*, 73 AD3d 1267, 1269 [2d Dept 2010] [internal quotations omitted]), and there are several speculative scenarios that may, or may not, affect the amount of wastewater ever actually treated or discharged by the Ithaca Area Wastewater Treatment Facility. Petitioner's claim of environmentally-related injury to Cayuga Lake is "devoid of evidentiary support and far too speculative and conjectural to demonstrate a specific injury-in-fact" (*see Clean Water Advocates of New York, Inc. v New York State Dept. of Envtl. Conservation*, 103 AD3d 1006, 1008 [3d Dept 2013]; *see also Long Is. Pure Water, Ltd. v New York State Dept. of Health*, 209 AD3d 1128, 1130 [3d Dept 2022] [holding that alleged injury that remediation technology will generate toxic byproducts in public water supply was based on "conjecture and is devoid of evidentiary support"]; *Shelter Is. Assn. v Zoning Bd. of Appeals of Town of Shelter Is.*, 57 AD3d 907, 909 [2d Dept 2008] [finding that petitioners generalized allegations of effect on the water table were insufficient to establish standing]).

Moreover, Petitioner "has not shown that any injuries that its members would suffer due to the alleged impacts to water bodies would be different from that faced by the general public" (*see Clean Water Advocates*, 103 AD3d at 1008). Standing to assert a claim based upon an impact upon a natural resource "require[es] a demonstration that a[n individual's] use of a resource is more than that of the general public" (*id.* at 1008-1009). Thus, the Third Department held that "[a]lthough petitioner alleges that its members use the water bodies for recreational purposes and as their potable water source, it does not allege, much less submit evidence, that any of its members do so any more frequently than any other person with physical access to those same resources" (*id.* at 1008). "As these generalized allegations do not demonstrate an injury distinct from the general public in the area, they are insufficient to confer standing (*id.* at 1009).

In *Schulz v Warren County Bd. of Supervisors* (206 AD2d 672 [3d Dept 1994]), petitioners alleged the project would lead to "increased runoff pollution which will result in a degradation of the quality of the waters of Lake George, which petitioners allegedly use for drinking, boating, fishing and swimming" (*id.* at 674). Although petitioners in *Schulz* owned property on Lake George, the lake is a public body of water, and the Third Department held that "their allegations are merely generalized claims of harm no different in kind or degree from the public at large, which are insufficient for standing purposes" (*id.* at 674; *see also* *Long Is. Pine Barrens Socy., Inc. v Planning Bd. of the Town of Brookhaven*, 213 AD2d 484, 485 [2d Dept 1995] [holding that petitioners' generalized allegations that project would have a deleterious impact upon an aquifer was insufficient to establish standing]). Similarly, Petitioner, here, alleges that many of its members obtain their drinking water from Cayuga Lake, and swim, kayak, fish, or otherwise recreate on the lake (*see* NYSCEF Doc. No. 1 at ¶¶5-8; *see also* NYSCEF Doc. Nos. 6, 7, 8, 9). These allegations are insufficient to confer standing.

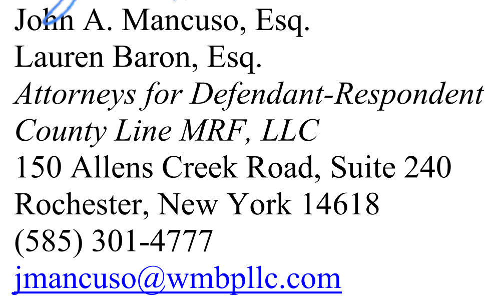
In sum, the gravamen of Petitioner's claims has nothing to do with the Part 360 Permit or the specific operation of the Facility. Petitioner's grievances are much broader. Petitioner essentially alleges that current technology and/or regulatory standards are insufficient to make certain that leachate, which may contain PFAS or allegedly poses a risk of harm, is adequately treated by wastewater treatment facilities in New York prior to being discharged into water bodies, such as the Finger Lakes. However, "[w]ithout an allegation of injury-in-fact, [Petitioner's] assertions are little more than an attempt to legislate through the courts" (*Rudder*, 93 NY2d at 280). As the Court of Appeals held in *Rudder*, grievances generalized to the degree that they become broad policy complaints are best left to the elected branches (*see id.*). Because Petitioner has failed to establish organizational standing, the Petition should be dismissed.

CONCLUSION

The Applicant respectfully submits that its motion should be granted in its entirety and the Petition dismissed on the ground that Petitioner lacks standing, together with any such other and further relief the Court deems just and proper.

Dated: February 24, 2023
Rochester, New York

WEAVER MANCUSO BRIGHTMAN PLLC



By: ______________________________

John A. Mancuso, Esq.
Lauren Baron, Esq.
Attorneys for Defendant-Respondent
County Line MRF, LLC
150 Allens Creek Road, Suite 240
Rochester, New York 14618
(585) 301-4777
jmancuso@wmbpllc.com

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

The undersigned hereby certifies that the total number of words herein, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block is 3,190.

Dated: February 24, 2023
Rochester, New York

JOHN A. MANCUSO