

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In the Matter of the Seneca Energy II, LLC,
Ontario County Landfill Gas to Energy Facility
Renewed and Modified Title V Permit,
NYSDEC Application ID 8-3244-00040/00002

Issued by the New York State Department of
Environmental Conservation

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DEPP-APD

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE TITLE V OPERATING PERMIT FOR SENECA ENERGY II, LLC**

I. INTRODUCTION

Pursuant to the Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), Finger Lakes Zero Waste Coalition, Inc. ("FLZWC", "Petitioner") hereby petitions the Administrator of the United States Environmental Protection Agency ("EPA") to object to the proposed Title V Operating Permit for the Ontario County Landfill Gas-to-Energy Facility, ("LFGTE plant"), located on site at the Ontario County Landfill ("the landfill"), and operated by Seneca Energy II, LLC ("SE"). Both SE and the landfill have Title V permits issued by New York State Department of Environmental Conservation, ("NYSDEC"), but the respective permits treat each as separate sources, with separate unrelated control requirements.

FLZWC is an environmental organization incorporated under New York's Not-for-Profit Corporations Law and recognized as a charitable organization under IRC § 501(c)(4). FLZWC's members, live, work, shop, play, rest and breathe the air in Seneca, New York, the town in which the subject LFGTE and landfill facilities are located. FLZWC's mission is to advance the goals

of a “zero waste” society in the local community, that is, a society in which no waste is generated for disposal.

On January 9, 2012, SE submitted to NYSDEC an application for renewal and modification of SE’s Title V permit. On or about July 18, 2012, NYSDEC issued a public notice providing a draft proposed Title V permit modification for SE and an opportunity for the public to comment on the proposed permit, up to August 17, 2012.¹ On August 17, 2012, prior to the close of the public comment period, FLZWC submitted comments to NYSDEC on the application. FLZWC’s comment letter is provided herewith as **Exhibit A**.²

On or about September 11, 2012, NYSDEC referred the proposed Title V permit for the landfill to EPA without any substantive changes in response to Petitioner’s comments, and a permit report.³

On or about September 11, 2012, NYSDEC issued a “Responsiveness Summary” responding to FLZWC’s comments. The Responsiveness Summary provided herewith as **Exhibit B**.

This petition is timely submitted within 60 days after EPA’s 45-day review following receipt of the issued permit. This petition addresses issues identified in comments provided to

¹ NYSDEC, Environmental Notice Bulletin, July 18, 2012, available at <http://www.dec.ny.gov/enb/20120718_reg8.html#832440004000002>.

² All exhibits and guidance documents referenced herein and not available via URL are provided herewith on an accompanying CD-ROM.

³ The issued permit and permit report are available at <http://www.dec.ny.gov/dardata/boss/afs/issued_atv_n.html>.

NYSDEC during the initial public comment period in this matter.

II. SUMMARY OF THE ARGUMENT

EPA should object to SE's Title V air permit as issued by NYSDEC for failure to consider the landfill and LFGTE plant a single source because the two facilities are contiguous, share a common major industrial classification (SIC code prefix), and are under common control; for failure to require a PSD/NSR preconstruction review because combined emissions were major prior to issuance of the permit and the modification of the permit authorizes significant increases in regulated emissions; and for failure to incorporate the requirements of 40 CFR Subpart WWW into SE's permit, because these are applicable requirements for the combined single source. The issued SE Title V permit is thus a sham because NYSDEC has failed to calculate the combined potential to emit of all emission sources; the landfill and LFGTE plant considered as a single source has in fact been operating at major source levels; and both facilities are simultaneously seeking to expand capacity but only SE's expansion is considered in the Title V permit. Once SE's proposed modification is properly characterized, and proper calculations of baseline and potential increase in emissions attributable to proposed modification are made available, FLZWC looks forward to commenting on possible additional Title V applicability issues.

III. BACKGROUND

The Title V permit issued to SE adds three internal combustion (“IC”) engines to its LFGTE plant, which currently operates eight IC engines dedicated to control of Ontario County Landfill’s LFG emissions. The landfill is operated under a lease from the County by Casella Waste Services of Ontario, LLC (“Casella”). The landfill is the sole source of SE’s fuel, including fuel for the three new LFG engines. SE is located on the landfill site.

History of NYSDEC’s Common Control Determination

Emissions from the landfill were not included in the calculation of the SE’s baseline or future potential emissions, based on NYSDEC’s determination that SE is not under common control with the landfill. *See* SE, Ontario LF LFG to Energy Facility Title V Air Permit Modification Application DEC ID: 8-3244-00040, January 2012, pp. 8-9, 11-12 (hereafter, “SE, Title V Applic.”), provided herewith as **Exhibit C**.

To make this determination, NYSDEC obtained a substantial amount of information from SE, the County and Casella. In early 2009 SE (then Innovative Energy Systems, LLC, or “IES”) submitted to NYSDEC a PSD Air Permit Application, eliciting this comment among others from NYSDEC:

The cumulative analysis for PSD increments . . . suggests that the flare on the landfill does not operate simultaneously with the engines. Unless this is made a permit limitation, the flare emissions should also be included in the cumulative analysis.

Leon Sedefian, Division of Air Resources, NYSDEC, Letter to Robert L. Harvey, Derenzo and

Associates, Inc., April 1, 2009, p. 2, provided herewith as **Exhibit D**. The PSD permit was subsequently withdrawn.

On April 14, 2009, NYSDEC asked SE, “is the addition of this last set of engines [i.e., additional to the eight operating IC engines] due to economics as well and will they handle the expected peak of gas generated by the current footprint of the landfill, or is this in anticipation of the landfill being expanded?” –to which SE responded by emphasizing the separate ownership of the LFGTE plant and the landfill. NYSDEC-Peter Zeliff email exchange, April 14, 2009, provided herewith as **Exhibit E**. *See also* Exhibit A, Comment 9.

More than a year later, NYSDEC had still not determined “whether to have an inclusive TV [Title V] Permit with separate energy facilities under the same permit as the landfill or to allow separate TV facility permits.” Michele Kharroubi, NYSDEC, email to David Derenzo, July 7, 2010, provided herewith as **Exhibit F**. However, NYSDEC advised that should it determine the landfill and SE must be treated as a single source, PSD and non-attainment NSR would be applicable:

Combining these two facilities results in PSD major status for both contaminants. Any engines or other sources added to this permit in excess of 40 tpy for a PSD contaminant would be applicable to PSD and/or NSR.

Id.

On January 7, 2011, NYSDEC issued to SE a Notice of Incomplete Application to renew and modify SE’s Title V permit, noting that

EPA is not in agreement that the Landfill and the Landfill Gas to Energy facilities are not under common control. Since the Administrator of EPA may prevent issuance of any Title V Facility Permit, these facilities must be considered a single

facility for PSD/NSR purposes.

Roger McDonough, NYSDEC, Letter to Peter Zeliff, SE, January 7, 2011, p. 1, provided herewith as **Exhibit G**. In the notice letter NYSDEC listed three subjects for which additional information must be provided by SE to complete its application: a combined baseline analysis that combines SE's eight operating IC engines with the landfill's emissions; "[s]ufficient information to establish that the addition of the four Caterpillar 3520 internal combustion engines to be added [subsequently reduced to three] is an independent project, separate from any future expansion of the Ontario County Landfill that may be proposed"; and any changes to the landfill gas collection system needed to facilitate SE's expanded capacity. *Id.*

Before SE responded, on May 23, 2011 Ontario County wrote to NYSDEC proposing that the County be the "lead agency" for purposes of reviewing a proposal to construct a new 40 acre landfill at the existing landfill site, noting: "The construction of an additional Landfill Gas to Energy Facility may require an upgrade to the electrical utility lines currently servicing the existing facility due to the increase in electricity generation." Karen DeMay, Clerk, Ontario County Board of Supervisors, letter to Kimberly Merchant, Deputy Regional Administrator, NYSDEC, May 23, 2011, Attachment at Item 17, provided herewith as **Exhibit H**. NYSDEC responded to the letter by accepting the proposal, and indicating that modifications to the Title V permits for SE and the landfill would be required and these modifications would be reviewed by NYSDEC together. Kimberly Merchant, NYSDEC, Letter to Karen DeMay, Ontario County Board of Supervisor, June 22, 2011, provided herein as **Exhibit I**.

Over four months later, SE responded to NYSDEC's January 7 incompleteness notice

and information request. SE responded to the first two subjects in the information request by reiterating its goal to maintain separate applicable requirements for emissions control: “The intention of permitting this as a single facility was to maintain a clear separation of permit compliance liability for compliance conditions specific to each of the separately managed and operated facilities.” Emily Zambuto, IES, email to Michele Kharroubi, NYSDEC, November 10, 2011, provided herewith as **Exhibit J**.

On November 9, 2011, NYSDEC requested information from Casella, regarding SE’s Title V modification application, asking specifically whether SE’s representations regarding the landfill are accurate; whether the landfill and SE share a workforce; and for an explanation of contractual arrangements between the two facilities providing that SE may repair and restore the landfill’s LFG collection system in the event LFG flow is interrupted, including “who is in charge of correcting and maintaining the flares and well field (gas collection and control system) in such situations.” Michele Kharroubi, NYSDEC - Jerry Leone, Casella, email exchange, November 9-10, 2011, provided herewith as **Exhibit K**. Casella responded by identifying natural gas lines located nearby that could be utilized by SE should LFG flow be interrupted. *Id.* However, the natural gas lines are not connected to SE, (*id.*), and no information was provided on what design changes would be necessary for SE to connect to the lines.

On December 22, 2011, Casella responded at length to NYSDEC’s January 7 and November 9, 2011 information requests, in part as follows:

Casella confirms that the following facts set forth in the [SE Title V modification] Application are accurate:

- The Landfill has the two-digit SIC Code, 49. To Casella's

knowledge, the LFGTE Facility also shares this SIC Code.

- The SIC Code for the Landfill is 4953.
- The LFGTE Facility is constructed on property leased directly from Ontario County.

The Landfill and other ancillary structures are constructed on land leased directly to Casella. The properties are contiguous.

David G. Carpenter, General Counsel, Casella, Letter to Michele Kharroubi, NYSDEC, December 22, 2011, p. 1, provided herewith as **Exhibit L**.

On January 5, 2012, NYSDEC wrote to SE, determining that SE and the landfill are not under common control and accordingly “will continue to be treated as two separate facilities.”

Thomas L. Marriott, Regional Air Pollution Control Engineer, NYSDEC, Letter to Emily Zambuto, SE, January 5, 2012, provided herewith as **Exhibit M**.

Landfill Permitting

Since the first modification of its Title V permit in 2004, the landfill has been subject to 40 CFR Subparts WWW (Landfills NSPS) and AAAA (Landfills NESHAP). In the month prior to issuance of SE’s Title V modification, in August, 2012, Casella submitted a Final Environmental Impact Statement (“FEIS”) in support of a 43.5-acre expansion of disposal cells at the Ontario County Landfill. *Cf.* FEIS, Appendix D, Overall Site Plan (map).⁴

⁴ The FEIS incorporates a Draft EIS (“DEIS”), both of which are available at <http://www.bartonandloguidice.com/ontariocountydeis/OntarioCountyDEIS/tabid/1006/Default.aspx>. A proposed analysis of cumulative emissions of the landfill and the LFGTE is included in DEIS, Attachment G. The 43.5 acre landfill expansion is denominated “Stage VIII” (16.0 acres) and “Stage IX” (27.5 acres) of the “Phase III” expansion of the landfill. Phase III was first authorized under the landfill’s June 25, 2004 Title V permit modification.

On June 23, 2011, the landfill submitted an application to modify its Title V permit, and the application was revised and re-submitted in November 2011 but has not reached the public comment stage. Like the landfill's FEIS in support of a state landfill operating permit modification, the landfill's Title V modification application remains pending. The modifications requested in both applications include the addition of a fourth enclosed flare at the landfill, and the deletion of a glass dryer facility from the list of emissions sources. *See* Ontario County Sanitary Landfill, Title V Air Permit Renewal Application, NYSDEC Applic. ID No. 8-3244-00004/00007 (January 2012), attached hereto as **Exhibit N**.⁵

The SE-Landfill Relationship

The landfill was constructed in three phases. Because the first two phases are closed portions of the landfill, their emissions have been considered negligible. Specifically, the Phase I landfill was "closed in 1980 with only approximately 66,500 tons of putrescible waste in place," and no gas collection system was installed. *Id.*, p. 8. The Phase II/IIA landfill was also closed in the 1980s, a gas collection system is installed, and emissions from this portion of the landfill have been modeled using Landfill Gas Emissions Model (LandGEM)⁶ default values. FEIS, pp.

⁵ The County seeks the removal of the glass dryer facility from the landfill's Title V permit, because this facility's fuel is natural gas, and it "cannot utilize landfill gas . . . and is therefore not dependent upon the landfill for fuel in any way." *Id.*, Emission Calculation Discussion, p. 4. However, the glass dryer's source of recyclable glass is dependent on the landfill's glass receipts.

⁶ The LandGEM modeling software is available at <http://www.epa.gov/ttncaatl/products.html>.

8-9.⁷

Phase III of the landfill and SE's operations are subject to contracts among Ontario County, Casella and SE governing the collection and utilization of LFG to produce electricity at SE's LFGTE plant. *See* Ontario County Bd. Supervisors, Resolution No. 422-2003, Authorizing Assignment of Agreements from Innovative Energy Systems, Inc., to Seneca Energy II, LLC [and] Ontario County Landfill, August 1, 2003, attaching "Excess Gas Utilization Agreement," and "Gas Assignment Agreement", provided herewith as **Exhibit O**. SE is obligated under the contracts to provide to the landfill "a steady flow of up to 150 standard cubic feet per minute . . . at no cost," to heat an office building on the landfill site. *Id.*, "Excess Gas Utilization Agreement," at Section 1.1.1. *See also id.*, "Gas Assignment Agreement," §§ II(E), III.

The landfill's flares combust excess gas SE cannot use, and provide backup control for LFG should SE be unable to operate, or unable to operate at full capacity. Exhibit N, pp. 10-11. However, it is unclear whether the flares can handle the estimated LFG generation rate.

According to the landfill Title V modification application, for the existing and operating landfill, without the new 43.5 acre expansion, "a maximum PTE landfill gas generation rate of 6,805 scfm is projected to occur" in 2016, the year currently planned for closure of Phase III. *Id.*, p. 9. However, the landfill's existing "3 enclosed flares total[] 3,450 scfm in potential LFG control capacity." Exhibit N, p. 10. A proposed but not yet permitted fourth flare would provide additional control capacity, "up to 3,000 scfm for a combined facility control capacity of 6,450

⁷ No calculation of greenhouse gas emissions has been undertaken, on the rationale that these are "biogenic" emissions excluded from EPA's GHG Tailoring Rule. DEIS, p. 73.

scfm.” *Id.*, p. 9. However, the landfill plans to use the fourth flare to help control an elevated LFG generation rate. *Id.* See also FEIS, Appendix BB, Attachment G, p. 1, Table 1, and Table D-4.⁸

Second, the LandGEM calculation on which the LFG generation rate to be controlled is based excludes “beneficial use” materials utilized as alternative daily cover (“ADC”), substantial portions of which are degradable and ultimately disposed in the landfill. DEIS, p. 74.⁹ Potential emissions of ADC included in a landfill’s waste mass must be calculated for Clean Air Act applicability purposes.¹⁰ The LFG generation rate for the existing and operating landfill is thus

⁸ In addition, emissions from a leachate storage lagoon are unclear. Projected leachate generation is reported as 18 million gallons per year in the County’s landfill expansion FEIS, but is reported as 17 million gallons per year in the County’s Title V modification application. HAP emissions utilizing the lower number are predicted in the latter application to be 24.4 tpy.

⁹ According to the landfill’s most recent annual report to NYSDEC, ADC comprised 16.38% of the material disposed in the landfill, and substantial portions of ADC include petroleum contaminated soil, MSW ash, paper mill sludge, processed construction and demolition debris, shredder fluff, and industrial sludge. Ontario County Landfill, Annual Report for 2011, Section 5 - Beneficial Use Materials (provided herewith as **Exhibit P**).

¹⁰ LFG control is required for each section of the landfill containing “degradable solid waste” in the waste mass of that section. 40 CFR § 60.759(3)(ii) (defining “mass”). “Landfill gases are the gases generated by the decomposition of organic waste deposited in the landfill and the gases derived from the evolution of organic compounds in the waste, and would include some of the VOCs remaining in the PCS [petroleum contaminated soils] used as daily cover in [a] landfill.” Carol M. Browner, EPA Administrator, Order Responding to Petitioner’s Request That the Administrator Object to Issuance of a State Operating Permit, *In the Matter of Roosevelt Regional Landfill Regional Disposal Company*, May 4, 1999, p. 11.n.10, available at <<http://www.epa.gov/region07/air/title5/t5memos/roosev4.pdf>>. “Maximum design capacity for purposes of estimating emissions and maximum expected gas flow from a landfill under Subpart WWW must include all solid waste and all cover materials except final cover materials (waste + daily cover + intermediate cover).” Letter from William deBoisblanc, Director, Permit Services Division, Bay Area Air Quality Management District (California) to Allied Waste Industries, dated August 8, 2001 (interpreting 40 C.F.R. § 60.751 applicability at Keller Canyon Landfill),

substantially underestimated.

No limitation on operating the flares on the landfill site simultaneously with SE's IC engines is provided in SE's Title V permit. However, the SE permit is based on a calculation of baseline and future emissions of the IC engines only.¹¹

available at <www.arb.ca.gov/fcaa/tv/tvinfo/permits/ba/a4618res.pdf>. Waste placement rate specified in a state landfill operating permit may not be used to avoid the regulatory definition of design capacity for purposes of estimating emissions:

The relationship between waste placement and PTE for CO . . . is as follows: The waste placement rate and design capacity (maximum waste mass that may be placed in the landfill) are variables used in EPA's landfill gas emissions model (LandGEM) to estimate the maximum potential landfill gas generation rate for the landfill. The NSPS/EG and MACT require that the gas collection and control system be designed to accommodate landfill gas at the maximum expected gas generation rate. This rate, with some assumptions about collection efficiency, is the basis for estimating maximum landfill gas flow rate to the flare and maximum annual CO emissions from combustion of landfill gas in the flare. It is also the basis for estimating maximum annual emissions of VOC from the flare and from uncollected landfill gas . . .

Jane M. Kenny, Regional Administrator, EPA Region 2, Letter to Erin M. Crotty, Commissioner, NYSDEC, June 30, 2003, Attachment at p. 7, available at <http://www.epa.gov/region07/air/title5/petitiondb/petitions/chaffee_abraham_response2002.pdf>. Accordingly, non-degradable ADC is excluded from the total waste mass for the purposes of emission rate calculations, and an operator's assertion that portions of the waste stream are non-degradable must be supported by "sufficient documentation." Steven C. Riva, EPA Region 2 to Peter Zeliff, IES, "Re: PSD Air Permit Application for the Innovative/DANC, LLC Landfill gas electricity generation facility at the DANC Solid Waste Management Facility, Rodman, Jefferson County, New York," April 27, 2009, p. 2, provided herewith as **Exhibit Q**.

¹¹ As discussed in Petitioner's comments to NYSDEC, during the winter of 2011-2012 SE increased gas flow to its existing IC engines, resulting in increased uncontrolled emissions of LFG, "evidenced by the presence of extreme odors experienced and reported by residents from distances of up to 7 miles from landfill," and ultimately remediated by installation of 13 new gas wells and one additional temporary flare at the landfill. Exhibit A, Comment 3. As noted in NYSDEC's response, "The additional gas could not be utilized by Seneca Energy since they did not have any permitted additional engine capacity." Exhibit B, Response to Comment 3. Also,

IV. ARGUMENT:

SE AND ONTARIO COUNTY'S LANDFILL ARE A SINGLE SOURCE

Two emissions sources (facilities) are considered a single stationary source under PSD/NSR and Title V when the facilities belong to the same major industrial grouping under the Standard Industrial Classification code, are located on one or more adjacent or contiguous properties, and are under the common control. 40 C.F.R. §§ 51.166(b)(5), (6). Even if the two facilities are issued separate Title V permits, where these three criteria are met and combined emissions of the facilities exceed PSD/NSR minor source limits, the facilities must obtain a PSD permit from EPA prior to commencing operations. EPA, Letter to Christopher Pilla, Virginia DEQ, April 4, 2002. Where a common control determination is made, Title V permits must be issued to both facilities as a single source. Ronald A. Borsellino, EPA Region 2, Letter to Scott Salisbury, Manchester Renewable Power Corp., ("MRPC"), May 11, 2009.

EPA has said that landfills and companion LFGTE plants served by them are presumptively under common control when the LFGTE facility is located (as it is here) on the landfill site. *Id.*, p. 3 ("A common control relationship is presumed when one operator locates on another's property. Rebuttal of the presumption of common control is the burden of the source.

similar incidents occurred in 2010 and 2007. *See* Casella, Letter to NYSDEC, "Re: Ontario County Landfill, Title V Permit ID No. 8-3244-00004/00007, Landfill Gas Open Flare Op-Flex Request," January 10, 2012, provided herein as **Exhibit R**; Casella, Letter to NYSDEC, , "Re: Ontario County Landfill, Additional Flare Installation," May 2, 2007 (with NYSDEC response, same date), provided herein as **Exhibit S**. Also, this Author is reliably informed that SE experienced another unplanned shut down on or about December 12, 2012.

. . . Because MRPC chose to locate on property owned by OCL [Ocean County Landfill] a common control relationship between OCL and MRPC is presumed”).

Here, SE and the Ontario County Landfill share a major industrial grouping, and the SE facility is located on the landfill site. *Cf.* Exhibit L, p. 1. *Cf.* 40 C.F.R. § 51.166(b)(5).

In addition, there is a relationship of common control between the two facilities, based on factors applied in recent EPA determinations.

Common Control Factors

On September 9, 2011, NYSDEC issued a Declaratory Ruling setting forth the manner in which it would analyze cases where a LFGTE plant is located on site at a landfill for purposes of making a common control determination. NYSDEC, Declaratory Ruling 19-19 (September 9, 2011), available at <<http://www.dec.ny.gov/regulations/77083.html>>. The Ruling declined to apply the criteria there set forth to determine whether a LFGTE operated by SE at the Seneca Meadows Landfill in Waterloo, New York, is under common control with the landfill, as requested by the petitioner landfill. *Id.* However, the Ruling adopts the criteria for such determinations set forth in a 1995 letter from William Spratlin, EPA Region 7 Director of Air, RCRA and Toxics Division, to the Iowa Department of Natural Resources, (hereafter, “Spratlin Letter”), and several other EPA guidance letters on the subject. “As stated in Director Spratlin’s letter, a positive answer to only one or more of the seven factors is enough to establish common control between two facilities.” Walter E. Mugdan, EPA Region 2, Letter to Erin M. Crotty, NYSDEC Commissioner, “Re: EPA’s Review of Proposed Permit for Al Turi Landfill,” July 8,

2004, Attachment, p. 2.

NYSDEC rejected Petitioner's assertion that factors of common control are presented here, based principally on the lack of common ownership:

There is no indication of common ownership between Seneca Energy II, LLC (Seneca Energy), Ontario County and Casella Waste Systems of Ontario, LLC (Casella). The two facilities (the landfill and the landfill gas-to-energy (LFGTE) facility) are owned and operated by separate entities, with no common parent or subsidiaries. The landfill owner, Ontario County, is a municipality. The LFGTE facility owner, Seneca Energy, is a private business entity operating its facility on land leased from the County. The landfill operator, Casella, is a separate corporate entity and part of a publicly traded company. None of these entities share personnel or officers. The fact that the Gas Assignment Agreement (GAA) allows emergency repairs to be made to the collection system owned by Ontario County for purposes of mitigating liability does not indicate a common workforce as set forth in EPA's "Spratlin" guidance letter, nor does it establish common control.

Exhibit B (NYSDEC, Responsiveness Summary), Response to Comment 1. However, common ownership is not required for a determination of common control under Title V.

In 2006, EPA said that if determined to be under common control, the Ocean County Landfill and its companion LFGTE plant, Manchester Renewable Power Corporation/LES, would each be "subject to Prevention of Significant Deterioration (PSD) requirements as a result of the significant modification that NJDEP is processing for MRPC—the addition of new engines at MRPC." Raymond Werner, EPA Region 2, Letter to David J. Shaw, Air Resources Div., NYSDEC, July 18, 2006, p. 2 (hereafter, "Werner Letter"). Subsequently, EPA determined the two facilities are under common control, based on the LFGTE plant's location on property

owned by the landfill. Ronald J. Borsellini, EPA Region 2, Letter to Scott Salisbury, President, MRPC, May 11, 2009. Factors supporting EPA's determination in the MRPC case included: the parent company of the landfill controlled the transfer or encumbrance of the LFGTE plant's stocks; LFG would be the LFGTE plant's only fuel; the landfill is contractually barred from selling LFG to unrelated entities; and the landfill and the LFGTE plant would share tax credits made available for LFGTE facilities. *Id.*, p. 4.

In the present case, Casella and SE would share equally tax credits available to LFGTE facilities. Exhibit O, "Gas Assignment Agreement," § IV and Schedule A.

In addition, LFG would be SE's only fuel. In its response to FLZWC's comments, NYSDEC rejected this conclusion, based on the following reasoning:

the [contract] gives Seneca Energy (SE) the right, but not the obligation to purchase the LFG. SE's engines can also run on natural gas. Since there is at least one natural gas pipeline within a reasonable distance of the energy plant, there is the ABILITY to hook up to those lines and purchase natural gas. However, the economics dictate at this time that LFG should be used.

Exhibit B, Response to Comment 6. However, as this response indicates, without substantial (and unplanned) physical changes SE cannot, as a practical matter, run on natural gas.

In addition, SE is obligated to return to Casella treated landfill gas from SE's facility at "a steady flow of up to 150 standard cubic feet per minute . . . at no cost." Exhibit O, "Excess Gas Utilization Agreement," Section 1 and "Gas Assignment Agreement," §§ II(E), III. The treated LFG provided by SE powers a boiler serving the landfill office building. Exhibit N, "Emissions Calculation Discussion," pp. 4-5.

An exclusive relationship is also reflected in the County's assignment of gas rights to SE:

Assignor agrees that Assignee may utilize the Gas for the operation of an expanded Electricity Project. Gas not utilized by Assignee in the Electricity Project shall be flared in accordance with appropriate federal, state and local laws at the expense of Assignor. Assignee will at all times operate the Electricity Project in substantial compliance with applicable environmental laws and regulations and will make a good faith effort to maximize the economic benefits of the electricity project for the benefit of both the Assignee and Assignor provided, however, that the Assignee's reasonable business judgment with respect to the Electricity Project's operation shall be binding upon the Assignor.

Exhibit O, "Gas Assignment Agreement," § I(B).

Thus, in addition to an exclusive gas utilization relationship, the judgment of SE as assignee as to "substantial compliance with" applicable rules is binding on the landfill (assignor).

The exclusivity of the relationship is also reflected in the agreement between Casella and SE to mutually indemnify the other in the event of any breach of the agreement. *Id.*, paras. 7 and 8; "Gas Assignment Agreement," § VII.

Another factor in determining common control is the degree of operational interdependence.¹² For example, where a landfill gas energy recovery system is "located on the

¹² Recently, EPA's utilization of indicia of a "functional interrelationship" between facilities was rejected for purposes of determining adjacency. *Summit Petroleum Corp. v. United States Environmental Protection Agency*, 690 F.3d 733 (6th Cir. 2012) (vacating an EPA determination that a combination of natural gas extraction wells and a geographically distant sweetening plant could be aggregated into a "major source" for purposes of the CAA). However, where physical adjacency is clearly established, as it is here, there is no reason to avoid consideration of indicia of operational interdependence for purposes of determining common control. This approach has been EPA's longstanding policy. *Cf.* 56 Fed.Reg. at 21,724 (proposing the support facility test in the NSR program); 59 Fed.Reg. at 44, 515 (proposing to incorporate the support facility test into the Title V program).

landfill property and will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery,” the landfill and the gas collection and control system are interdependent and therefore deemed to be under common control. EPA, Letter to Terry Godar, Virginia DEQ, February 11, 1998.

However, if the landfill owns and controls its own gas collection system, such as a flare, such that it does not need the LFGTE plant, and the gas energy recovery system can run exclusively on alternative fuels, the permitting agency or EPA would likely conclude that the two facilities are not under common control. EPA, Letter to Gary E. Graham, Virginia DEQ, May 1, 2002 (discussing and distinguishing EPA’s letter to Terry Godar, Virginia DEQ, February 11, 1998).

Here, as noted above, the landfill operates flares whose combined capacity falls short of what is required to manage the landfill’s gas generation rate. The landfill therefore needs SE to control its LFG.

In addition, although the landfill owns the LFG collection system, it shares control of the system with SE. SE is designed to operate 24/7 and therefore requires the ability to control the gas collection system at the landfill. *See* 6 NYCRR § 208.3(b)(2)(ii)(a) (requirements for active gas collection systems at landfills). Accordingly, the landfill has agreed to allow SE on site to repair the landfill’s gas collection system at times when the landfill is unmanned.

“LFGTE facility operators (employed by Seneca Energy) work 5 days a week 7:00 AM - 3:30 PM and remain on call 24 hours a day,” and by contractual arrangement, “if there is an interruption of the gas production and/or supply[,] . . . the Assignee (Seneca Energy) shall have

immediate access to inventory (pipeline and incidentals) and the Ontario County Landfill for purposes of repair and restoration of the collection system.” Emily Zambuto, IES, email letter to Michele Kharroubi, NYSDEC, November 30, 2011, provided herewith as **Exhibit T**. During interruptions in LFG flow “at times when the landfill is unmanned,” SE assumes responsibility for “repair and restoration of the [LFG] collection system” at the landfill. *Id.* It is therefore inaccurate to conclude, as SE and NYSDEC have, that “[t]he two entities share no equipment, personnel, and have no financial interest in the other.” *Id.* In fact, during times when the landfill is unmanned and an equipment failure occurs, SE’s must be able to control the landfill’s LFG collection system in order to repair and restore the system. *Cf.* Werner Letter, pp. 3-4 (citing and discussing 19 CFR § 240.12b-2 of the SEC regulations defining “control,” as incorporated into EPA’s policy governing common control determinations). As reflected in the access provision of the County-SE contract, the landfill relies on SE to ensure the proper operation of its LFG collection system.

Finally, in addition to the landfill’s operational dependence on SE, SE is dependent for its operations on the landfill. First, SE is obligated under contract to provide a steady flow of treated LFG to the landfill. Exhibit O, “Excess Gas Utilization Agreement,” Section 1.1.1; “Gas Assignment Agreement,” §§ II(E), III. SE cannot cease collecting and treating LFG without violating its contract with the landfill.

Second, SE is not able to utilize alternative fuel without substantial design changes. Since there are no plans to redesign SE, for the foreseeable future SE “will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery.”

EPA, Letter to Terry Godar, Virginia DEQ, February 11, 1998.

In its response to FLZWC's comments on SE's Title V permit modification application, NYSDEC concluded that SE has the ability to operate for the next 10 years without any further landfill expansion. Exhibit B, Response to Comment 9. However, NYSDEC's response fails to address whether SE is currently dependent on the landfill, as a practical matter, without any further expansion of landfilling, and whether there are any plans to re-fit SE's facility to utilize alternative fuels. In the reopening of the Title V permit for the Al Turi Landfill and its associated LFGTE, operated by Ameresco, EPA looked to whether the two facilities are in fact inter-dependent, not whether the facilities could become independent as a result of some future action:

Presently, [Ameresco's LFGTE plant] is receiving 100% of its gas supply from Al Turi and is not supplementing through other sources. Although it may supplement its gas supply through another fuel, Ameresco's main source of fuel is Al Turi's landfill gas, which it is contractually obligated to purchase. As a result, Ameresco is dependent upon Al Turi, *since Ameresco can not operate without Al Turi's landfill gas, its main, and, in fact, only gas supplier.*

Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, Commissioner, NYSDEC, "Re: EPA's Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1," July 8, 2004, Attachment, p. 3 (italics added). Similarly, because SE is presently dependent upon the Ontario County Landfill and cannot operate without the landfill's gas, its only gas supplier at present, and there is no indication of any plans to re-fit SE to utilize another gas supplier, SE is dependent on the landfill.

Third, condensate generated by SE's landfill gas transport and treatment process "is

pumped through a sealed system into the LF leachate collection system.” Exhibit P, p. 22 (Ontario County Landfill, Annual Report for 2011). Under its current design, SE presently has no other means of disposing of such condensate and depends on the landfill for disposal.

Sham Permit

Under Title V “[t]he fragmentation of an operation such that the operation avoids regulation by a relevant standard” constitutes impermissible circumvention of applicable requirements under the Clean Air Act. 40 C.F.R. § 63.4(b). When a source intends to operate at major source levels but has accepted operational limitations in order to obtain a minor source permit, the permit is a sham and void ab initio, requiring the source to obtain a major source permit prior to constructing or operating. Terrel Hunt and John Seitz, USEPA, Memorandum, “Guidance on Limiting Potential to Emit in New Source Permitting,” June 13, 1989, 10-16. Criteria for determining whether a permit is a sham in this sense include (1) filing a PSD or nonattainment NSR permit application; (2) applications for funding that require operations in excess of minor permit limitations; (3) business reports on projected production levels that exceed permit limitations; and (4) company statements to permitting authorities showing an intent to operate at such levels. *Id.*, pp. 14-15. “[I]f a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.” *Id.*, 16.

Here, all of these criteria are present. SE filed a PSD permit with NYSDEC in 2009. *See* Exhibit D. In addition, SE relies for funding in part on tax credits to make its project feasible.

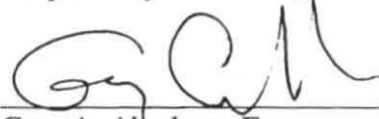
Exhibit O, "Gas Assignment Agreement," § IV and Schedule A. In addition, SE's and the landfill's business reports, including their respective Title V modification applications, indicate that the combined facilities operate at levels exceeding current permit limitations, and intend to operate at such levels.¹³ The Title V permit issued to SE is therefore a sham.

V. CONCLUSION

Because the issued Title V permit for SE fails to aggregate emission sources at SE and the Ontario County Landfill, EPA should object to the Proposed Title V Permit and direct NYSDEC to recalculate baseline and future emissions for the single aggregated source.

Dated: December 22, 2012

Respectfully Submitted,



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Enclosure: CD-ROM

To: Lisa P. Jackson, Administrator

¹³ Utilizing the results of modeling and estimation calculations provided by SE and the landfill, Petitioner has provided a summary table of existing emissions and potential future emissions assuming both facilities expand as planned, herewith as **Exhibit U**. According to these calculations (whose accuracy Petitioner disputes), as an aggregated single source existing operations are major for all criteria pollutants except lead, and are major for total HAPs. *Id.* As an aggregated single source, the expansion of the LFGTE plant together with the 43.5 acre landfill expansion exceeds significance levels for each of these parameters. *Id.*

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EXHIBIT LIST*(found in accompanying CD-ROM)*

- Exhibit A FLZWC, Comment Letter to NYSDEC, "Re: Ontario County Lfg to Energy Facility, Article 19 Air Title V Facility, DEC Application ID # 8-3244-00040/00002," August 17, 2012
- Exhibit B NYSDEC Region 8, "Responsiveness Summary – Seneca Energy II LLC Ontario County Landfill Gas to Energy Facility Draft Renewed and Modified Title V Permit DEC Application ID 8-3244-00040/00002," issued on or about September 11, 2012
- Exhibit C Seneca Energy II, Ontario LF LFG to Energy Facility Title V Air Permit Modification Application DEC ID: 8-3244-00040, January 2012
- Exhibit D Leon Sedefian, Division of Air Resources, NYSDEC, Letter to Robert L. Harvey, Derenzo and Associates, Inc., April 1, 2009
- Exhibit E NYSDEC-Peter Zeliff email exchange, April 14, 2009
- Exhibit F Michele Kharroubi, NYSDEC, email to David Derenzo, July 7, 2010
- Exhibit G Roger McDonough, NYSDEC, Letter to Peter Zeliff, SE, January 7, 2011
- Exhibit H Karen DeMay, Clerk, Ontario County Board of Supervisors, letter to Kimberly Merchant, Deputy Regional Administrator, NYSDEC, May 23, 2011
- Exhibit I Kimberly Merchant, NYSDEC, Letter to Karen DeMay, Ontario County Board of Supervisor, June 22, 2011
- Exhibit J Emily Zambuto, Innovative Energy Systems, LLC, email to Michele Kharroubi, NYSDEC, November 10, 2011
- Exhibit K Michele Kharroubi, NYSDEC - Jerry Leone, Casella, email exchange, November 9-10, 2011
- Exhibit L David G. Carpenter, General Counsel, Casella, Letter to Michele Kharroubi, NYSDEC, December 22, 2011

- Exhibit M Thomas L. Marriott, Regional Air Pollution Control Engineer, NYSDEC, Letter to Emily Zambuto, SE, January 5, 2012
- Exhibit N Ontario County Landfill, Title V Air Permit Modification Application DEC ID: 8-3244-00040 (January 2012)
- Exhibit O Ontario County Bd. Supervisors, Resolution No. 422-2003, Authorizing Assignment of Agreements from Innovative Energy Systems, Inc., to Seneca Energy II, LLC [and] Ontario County Landfill, August 1, 2003, attaching "Excess Gas Utilization Agreement," and "Gas Assignment Agreement"
- Exhibit P Ontario County Landfill, Annual Report for 2011 (submitted to NYSDEC), March 1, 2012
- Exhibit Q Steven C. Riva, EPA Region 2 to Peter Zelif, IES, "Re: PSD Air Permit Application for the Innovative/DANC, LLC Landfill gas electricity generation facility at the DANC Solid Waste Management Facility, Rodman, Jefferson County, New York," April 27, 2009
- Exhibit R Casella Waste Services of Ontario, LLC, Letter to NYSDEC, "Re: Ontario County Landfill, Title V Permit ID No. 8-3244-00004/00007, Landfill Gas Open Flare Op-Flex Request," January 10, 2012
- Exhibit S Casella Waste Services of Ontario, LLC, Letter to NYSDEC, "Re: Ontario County Landfill, Additional Flare Installation," May 2, 2007 (with NYSDEC response, same date)
- Exhibit T Emily Zambuto, IES, email letter to Michele Kharroubi, NYSDEC, November 30, 2011
- Exhibit U Table, "Ontario County Landfill and LFGTE Plant Emissions and PTE from Proposed Expansion," prepared by FLZWC for this Petition

EPA guidance letters cited above are provided in a separate folder on the accompanying CD-ROM.