

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

X

In the Matter of the Seneca Energy II, LLC,
Seneca Meadows Landfill Gas to Energy Facility
Renewed and Modified Title V Permit,
NYSDEC Application ID 8-4532-00075/00029

Issued by the New York State Department of
Environmental Conservation

X

**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), Concerned Citizens of Seneca County, Inc. ("CCSC", "Petitioner") hereby petitions the Administrator of the United States Environmental Protection Agency ("EPA") to object to the proposed Title V Operating Permit for the Seneca County Landfill Gas-to-Energy Facility, ("LFGTE plant"), located on site at the Seneca Meadows 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.

CCSC 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). CCSC's members, live, work, shop, play, rest and breathe the air in Seneca Falls, New York, the town in

which the subject LFGTE and landfill facilities are located, as well as an immediately adjacent other town, Waterloo, New York. CCSC's mission is to promote the health and quality of life of the Seneca County region of New York State (as well as neighboring counties) by ensuring that Seneca County's air, soil, water and environment are clean and healthful.

On March 22, 2013, SE submitted to NYSDEC an application for renewal and modification of SE's Title V permit. On or about March 27, 2013, NYSDEC issued a public notice providing a draft proposed Title V permit modification and renewal for SE and an opportunity for the public to comment on the proposed permit, up to April 26, 2013. On April 22, 2013, prior to the close of the public comment period, CCSC submitted comments to NYSDEC on the application. CCSC's comment letter is provided herewith as **Exhibit A**.¹

On or about May 29, 2013, 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.²

On or about May 29, 2013, NYSDEC issued a "Responsiveness Summary" responding to CCSC's comments. The Responsiveness Summary is 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 the 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,

¹ All exhibits and guidance documents referenced herein and not available via URL are provided herewith on an accompanying CD-ROM.

² The issued permit and permit report are available at http://www.dec.ny.gov/dardata/boss/afs/issued_atv_q.html.

belong to the same industrial grouping (because Seneca Energy is a support facility for Seneca Meadows, even though they have different SIC codes), 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 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 have, are, or soon will be, 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, CCSC looks forward to commenting on possible additional Title V applicability issues.

III. BACKGROUND

The Title V permit issued to SE will allow the portion of the LFG that is currently being flared at Seneca Meadows to be transferred (piped) to the High btu facility where it will be treated and refined to pipeline quality gas. The landfill is operated privately by Seneca Meadows, Inc of Seneca Falls - Waterloo, NY ("SMI"). The landfill is the sole source of SE's fuel for its 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, NYSDEC Environmental Conservation Permit Review Report, DEC ID: 8-4532-00075-00029, March 22, 2013 (hereafter, "SE, Title V Report"), provided herewith as **Exhibit C**.

To make this determination, NYSDEC obtained an additional amount of information from SE and, on September 13, 2011, issued to SE a Notice of Incomplete Application to renew and modify SE's Title V permit, noting that case-by-case common control determinations are to be made and that the department had not yet had time to make a common control determination, and that even more information was still required, as so requested in a letter of October 14, 2011, provided herewith as **Exhibits D** and **E**, respectively.

IV. ARGUMENT:

SE AND THE SENECA MEADOW'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. . . . 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 Seneca Meadows Landfill share a major industrial grouping, and the SE facility is located on the landfill site. *Cf.* 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. 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, Seneca Meadows and SE would *apparently*³ share tax credits available to LFGTE facilities as a result of generation of electricity or greenhouse gas credits.

³ NOTE: I say "apparently share tax credits" because this information is whited out and/or left blank on the original Petition for Declaratory Ruling submitted by Seneca Meadows, Inc.

See **Exhibit F**, Petition for Declaratory Ruling, “Gas Sale Agreement,” ARTICLE VII, LFG PAYMENTS, Section (d) Tax Credits,” p. 16. In addition, LFG would be SE’s only fuel.

An exclusive relationship is also reflected in the Seneca Meadows’ assignment of gas rights to SE:

SMI hereby grants and dedicates to the Company the first rights to all LFG produced at the Landfill limited to quantities sufficient to meet the Company Requirements. . . .**Exhibit F**, Id., “Gas Sale Agreement,” ARTICLE IV, § 4.I (a).

The exclusivity of the relationship is also reflected in the agreement between Seneca Meadows and SE to mutually indemnify the other in the event of any breach of the agreement. See **Exhibit F**, Id., “Gas Sale Agreement,” ARTICLE VII, INDEMNIFICATION AND INSURANCE, p 16.

Another factor in determining common control is the degree of operational interdependence.⁴ For example, where a landfill gas energy recovery system is “located on the 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

⁴ 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).

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.

And 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).

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 F**, "Gas Assignment Agreement," ARTICLE IV, § 4.I (a). SE cannot cease collecting and treating LFG without violating its contract with the landfill.

SE is also 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.

The SE LFGTE facility relies exclusively on landfill gas from the Seneca Meadows Landfill for its operation. It utilizes no other source of fuel to produce energy. Under these conditions, it does not matter that the two facilities are under separate, independent ownership. The intimate and necessary interdependence of the two facilities means they are under common control for purposes of the Clean Air Act. EPA, Letter to Terry Godar, Virginia DEQ, February 11, 1998.

In its response to CCSC's comments on SE's Title V permit modification and renewal application, NYSDEC 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 interdependent, 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 Seneca Meadow's Landfill and cannot easily 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.

Second, the installation, operation and maintenance of the gas collection system used by SE is performed by Seneca Meadows, **Exhibit F**, ARTICLE V, USE OF RIGHTS and MAINTENANCE, § 5.I(a)(ii). Similarly, under its current design, SE presently has no other means of performing these functions, as it depends on the landfill for them.

Third, condensate generated by SE's landfill gas transport and treatment process is apparently (i.e., according to the lease agreement) pumped through the Seneca Meadows leachate

collection system. **Exhibit F**, ARTICLE V, USE OF RIGHTS and MAINTENANCE. Under its current design, SE presently has no other means of disposing of such condensate and depends on the landfill for disposal.

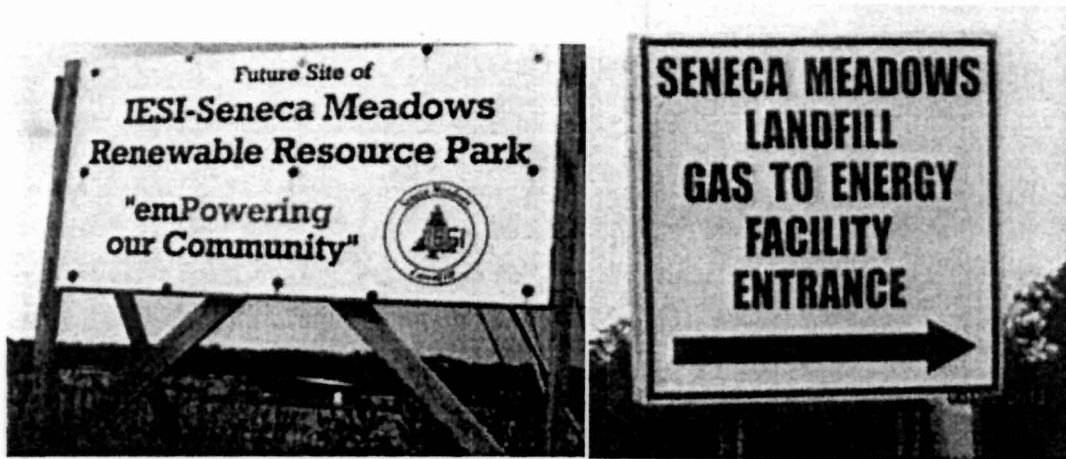
Sham Permit

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 G** for response shown by EPA. In addition, SE relies for funding in part on tax credits to make its project feasible. See **Exhibit F**, “Gas Sale Agreement,” ARTICLE VII, LFG PAYMENTS, Section (d) Tax Credits,” p, 16.

In addition, SE's and the landfill's respective Title V modification applications indicate that the combined facilities operate at levels exceeding current permit limitations, and intend to operate at such levels. The Title V permit issued to SE is therefore a sham.

Further evidence still of the "common control" relationship between Seneca Meadows and SE is shown by the two pictures below, in which Seneca Meadows openly advertises to the local population that it, as opposed to SE, is in control (as in "common control") of the SE LGTE operations by the signage that it has constructed adjacent to SE's Seneca Falls, NY LGTE site. Exhibits H and I (both pictures taken June 23, 2013), below.



Similarly, Seneca Meadows' parent company implies control (as in "common control") of SE's LGTE operations on their website at <http://iesipa.com/environmental-responsibility/> as shown in the screen capture, below, taken September 8, 2013 and herein referenced as **Exhibit J**, wherein they say that "Our Seneca Meadows landfill has created a 200-acre "Renewable Resource Park" that builds on the resources created by the landfill's 17 megawatt landfill gas-to-energy facility."

Our Seneca Meadows Landfill has created a 200-acre "Renewable Resource Park" that builds on the resources created by the landfill's 17 megawatt landfill gas-to-energy facility. Our plan is to build more gas-to-energy facilities as our landfills continue to develop.

V. CONCLUSION

Petitioner objected to the issuance of this proposed permit during the public comment period. Among other objections, Petitioner specifically objected on the ground that the permit failed to quantify emissions of hazardous air pollutants (all emitting sources combined). Further, Petitioner specifically objected that it failed to seriously consider that SE is part of a group of stationary sources located within a contiguous area and under common control that, in the aggregate, emits or has the potential to emit in excess of the threshold amount. See 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 70.2(12). Petitioner objects to the proposed permit on these same grounds, again.

Note that the list of examples given in this petition reflecting the common control relationship between the landfill and the SE is not exhaustive, nor are they intended to be. They are intended only to provide further evidence of common control, since the EPA has already determined that the information examined regarding the relationships between these entities does not rebut the presumption of common control.

Consequently, the EPA should therefore now render this determination as final.

This finding of common control and the previously established facts that Seneca Meadows and SE are collocated and share the same industrial grouping, provide that Seneca Meadows and SE are to be treated as a single source for the purpose of permitting under the PSD, NSR, and Title V programs of the Clean Air Act.

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

The existing Title V permits for SE and Seneca Meadows must be reopened and reissued to both companies as a combined single source.

Dated: September 9, 2013

Respectfully Submitted,



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Enclosure: CD-ROM

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EXHIBIT LIST (found in accompanying CD-ROM)

Exhibit A

CCSC, Comment Letter to NYSDEC, "Re: Seneca Energy Lfg to Energy Facility, Article 19 Air Title V Facility, DEC Application ID # 8-4532-00075/00029, Seneca Energy in Seneca Falls, NY

Exhibit B

NYSDEC Region 8, "Responsiveness Summary – Seneca Energy Landfill Gas to Energy Facility Draft Renewed and LLC Modified Title V Permit DEC Application ID 8-4532-00075/00029," issued on or about May 29, 2013

Exhibit C

SE, NYSDEC Environmental Conservation Permit Review Report, DEC ID: 8-4532-00075-00029, Renewal Number 2, March 22, 2013.

Exhibit D

NYSDEC Region 8 "Notice of Incomplete Application, Application ID 8-4532-00075/00029, issued on September 13, 2011 to SE

Exhibit E

NYSDEC Region 8 "Follow up and Request for More Information, Application ID 8-4532-00075/00029, issued on October 14, 2011 to SE

Exhibit F

Petition for Declaratory Ruling from Seneca Meadows, Inc., "Gas Sale Agreement," p, 1-25.

Exhibit G

Letter response by EPA to SE's filing for a PSD permit with NYSDEC in 2009, dated March 2, 2010, 8 pages.

Exhibit H

Photographic image showing "Future Site of Seneca Meadows Renewable Resource Park (evidencing "common control" relationship between SE and Seneca Meadows).

Exhibit I

Photographic image showing "Future Site of Seneca Meadows Landfill Gas to Energy Facility Entrance" (evidencing a "common control" relationship between SE and Seneca Meadows).

Exhibit J

Photographic image (screen capture) taken from Seneca Meadow's parent company evidencing a "common control" relationship between SE and Seneca Meadows by stating that "Our Seneca Meadows landfill has created a 200-acre "Renewable Resource Park" that builds on the resources created by the landfill's 17 megawatt landfill gas-to-energy facility."

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