



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

5 POST OFFICE SQUARE, SUITE 100

BOSTON, MA 02109-3912

March 25, 2016

Mr. Douglas L. McVay, Chief
Office of Air Resources
Department of Environmental Management
235 Promenade Street
Providence, RI 02908

Dear Mr. McVay:

In your December 24, 2015 letter, you requested a source determination from the U.S. Environmental Protection Agency (EPA) for three entities: Rhode Island Resource Recovery Corporation (RIRRC), Broadrock Gas Services LLC (Broadrock), and Rhode Island LFG Genco, LLC (Genco). These entities own/operate various aspects of the Central Landfill, gas collection and control system, and companion landfill gas-to-energy facility located in Johnston, Rhode Island. Specifically, you asked whether, for purposes of the Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and title V permitting programs of the Clean Air Act (CAA), these three entities should be considered (1) a single stationary source, (2) separate stationary sources, or (3) "some hybrid" of single and separate stationary sources.

Rhode Island's PSD, NNSR, and title V programs have been approved by EPA, and it is accordingly the State's responsibility to ensure that source determinations are made consistent with minimum program requirements. We hope that this letter, which is based on the information provided to us by the Rhode Island Department of Environmental Management (RI DEM), will be of assistance to your office in future permitting actions.¹

Based on the information provided, RIRRC is a municipal solid waste landfill, which generates landfill gas. The landfill gas is collected by a gas collection system owned by Broadrock. The gas collection system is operated under contract by American Environmental Group, LLC. Landfill gas is sent to Genco, who owns and operates a gas collection and conditioning system and four combustion turbines for purposes of generating electricity via the combustion of treated landfill gas. Genco also owns and operates four reciprocating engines and one enclosed flare. Broadrock owns and operates one enclosed flare and six candlestick flares capable of combusting landfill gas. In terms of ownership, RIRRC is a quasi-public corporation chartered by the Rhode Island General Assembly. Broadrock and Genco are private corporations.

¹ This letter does not constitute a final agency action subject to judicial review under CAA section 307(b), 42 U.S.C. § 7607(b). See, e.g., *Ocean Cnty. Landfill Corp. v. EPA*, 631 F.3d 652 (3rd Cir. 2011).

Based on the information presented to us, and as more fully explained below, EPA believes that it would be appropriate and reasonable to treat the facilities described above as a single stationary source under the PSD, NNSR, and title V programs. EPA has come to this conclusion after reviewing the information contained in your submittal, as well as the November 13, 2014 letter entitled "Re: Response to Information Request," sent to you by Mr. Michael O'Connell of RIRRC. That letter provided information regarding the various agreements between the respective parties. On November 18, 2014, you provided this letter to EPA via email.

To date, EPA has responded to numerous source determinations with respect to landfills and companion gas-to-energy facilities.² The Agency also had occasion to discuss the common control issue in an order regarding a common control determination for a similar landfill gas-to-energy facility in New York.³ For facilities to be considered a single source of criteria pollutants under the PSD, NNSR, and title V permitting programs, the following three criteria must be satisfied:

- (1) The facilities are located on one or more contiguous or adjacent properties;
- (2) They share the same two-digit (major group) Standard Industrial Classification (SIC) code (or one facility is considered a support facility to the other);⁴ and
- (3) They are under common control of the same person (or of persons under common control).

See 40 C.F.R. §§ 70.2, 71.2, 63.2, 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6).

Based on the information provided to EPA, we find that it would be reasonable to conclude that each of these criteria has been met.

First, all three facilities are located on the same parcel of property. RIRRC owns the property upon which it operates its landfill. Broadrock's gas collection system, which removes gas directly from capped areas of the landfill, is thus clearly within the landfill's property boundary. Genco's assets are also located on RIRRC-owned property, as evidenced by a lease agreement most recently amended by both parties on November 17, 2008.

² See, e.g., Letter from Judith M. Katz, Director, Air Protection Division, U.S. EPA Region 3, to Gary E. Graham, Environmental Engineer, Commonwealth of Virginia Department of Environmental Quality, "Re: Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generating Corporation," dated May 1, 2002; Letter from Gregg M. Worley, Chief, Air Permits Section, U.S. EPA Region 4, to James Capp, Chief, Air Protection Branch, Georgia Department of Natural Resources, in response to a request for a common control determination between PowerSecure and Houston County Landfill, dated December 16, 2011.

³ See In the Matter of Seneca Energy II, LLC, https://www.epa.gov/sites/production/files/2015-09/documents/seneca_response2012.pdf.

⁴ The two-digit SIC code (or support facility test) is not used in aggregating hazardous air pollutant emissions under Section 112 of the Act, including the Section 112 major source definition in title V. Rather, these emissions are aggregated without regard to the two-digit SIC code or the support facility test. This distinction is based on the Clean Air Act. See CAA section 112(a)(1) and 501(2); *National Mining Assoc. v. EPA*, 59 F.3d 1351, 1356 (D.C. Cir. 1995).

Second, the facilities either share a two-digit major group SIC code, or are the support facility to entities sharing a two-digit major SIC code. RIRRC and Genco share the two-digit SIC code of 49, which covers electric, gas, and sanitary services. The code for the landfill owned and operated by RIRRC is 4953. The code for Genco is 4911, which covers electric services. EPA believes that it is appropriate and reasonable to conclude that the landfill gas collection system owned and operated by Broadrock is a support facility to one or both of these entities, because it assists with their effort to convert landfill gas to electricity, and facilitates the landfill's compliance with gas collection requirements for EPA's Standard of Performance for Municipal Solid Waste Landfills (*See* 40 CFR Part 60, Subpart WWW).

Finally, EPA believes that it would also be appropriate and reasonable to conclude that the facilities in question are under "common control" as that term is used in EPA's regulations.⁵ As an initial matter, you state that, "Rhode Island LFG Genco LLC is a subsidiary of Broadrock Gas Services LLC." Accordingly, all equipment owned by either corporation is inherently under the common control of Broadrock Gas Services LLC. In addition, as noted above, all three entities have ownership rights concerning the same property and they also have contractual relationships with each other in relation to the various landfill activities that occur on that property. The nature of those rights and substance of those contractual relationships is indicative of a common control relationship.

The EPA elaborated on the term "common control" in a September 18, 1995 letter from William A. Spratlin, Director of Air, RCRA, and Toxics Division, U.S. EPA Region 7, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources. The Spratlin Letter identified a "not exhaustive" list of indicators and questions that the EPA has found to be a useful "screening tool" for determining whether facilities are under common control for purposes of the CAA. Notably, when EPA itself conducts a common control determination, the Agency presumes that a common control relationship exists when one company locates on another's property. The Spratlin Letter explained that EPA reasonably presumes that these so-called "companion" facilities are under common control because companies rarely locate on each other's property in the absence of a common control relationship:

Typically, companies don't just locate on another's property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another.⁶

⁵ The phrase "common control" is not defined in the Clean Air Act, or in EPA's regulations that pertain to title V or PSD. In an early NSR rulemaking, however, EPA rejected a simplified test of control based on some specified voting share, instead stating that "control can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity" and further explained that EPA would "be guided by the general definition of control used by the Securities and Exchange Commission, [in which] control 'means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.'" 45 Fed. Reg. 59874, 59878 (September 11, 1980) (quoting 17 C.F.R. § 210.1-02(g)). This definition is echoed in other Securities and Exchange Commission regulations, *e.g.*, 17 C.F.R. § 230.405, which defines "control" and "under common control with" and as meaning, "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See also *id.* § 240.12b-2.

⁶ Spratlin Letter at 1.

In this case, the fact that the equipment owned by Broadrock (and its subsidiary, Genco) are co-located on the same parcel of land as RIRRC's landfill is highly suggestive to the Agency that a common control relationship likely exists between the facilities. This presumption is buttressed by several relevant facts presented to us, including that:

- (a) Broadrock has compliance responsibility with respect to gas collection and control system requirements pursuant to EPA's Standard of Performance for Municipal Solid Waste Landfills (See 40 CFR Part 60, Subpart WWW). This regulation also has applicable requirements for RIRRC;
- (b) Broadrock must deliver any landfill gas from the toe of the slope of the landfill to a predetermined demarcation point, and Genco has the responsibility to accept delivery of any landfill gas from the demarcation point;
- (c) RIRRC provides certain amounts of direct funding to Broadrock as a result of a Landfill Gas Service Agreement;
- (d) According to RI DEM, electricity generation could not be accomplished at the Genco facility without landfill gas supplied by Broadrock;
- (e) RIRRC has granted Broadrock "sole and exclusive rights" to all the landfill gas it produces;
- (f) RIRRC is required by agreement to assign to Broadrock its air permits necessary to own, operation, and maintain the gas collection system.

For the reasons specified above, EPA would find it appropriate and reasonable to consider RIRRC, Broadrock, and Genco as a single stationary source under the PSD, NNSR, and title V permitting programs. It should be reiterated that the factors identified in this letter supporting a conclusion that there is a common control relationship between RIRRC, Broadrock, and Genco are not exhaustive, nor are they intended to be. They are only illustrative of the fact that EPA would likely conclude that a common control relationship exists among these entities at the Central Landfill. RI DEM, as the relevant permitting authority, may exercise reasonable discretion when making common control determinations in accordance with applicable legal requirements. We hope that in exercising its discretion, RI DEM will find this letter to be helpful.

If you have any questions regarding the above, please contact Patrick Bird at 617-918-1287 or bird.patrick@epa.gov.

Sincerely,



Kenneth Moraff, Director
Office of Ecosystem Protection