

BEFORE THE  
STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

**IN THE MATTER OF  
SENECA MEADOWS, INC.,**

**PETITION FOR  
DECLARATORY RULING**

**INTRODUCTION**

Petitioner Seneca Meadows, Inc. (SMI) owns and operates the Seneca Meadows Landfill located at 1786 Salcman Road, Seneca Falls, New York 13165-0065. SMI's landfill is permitted by the Department of Environmental Conservation (the Department) as a non-hazardous solid waste landfill under 6 NYCRR Part 360 and as a Title V facility under 6 NYCRR Subpart 201-6.

Landfill gas (composed primarily of methane) generated by the decomposition of waste in the landfill is collected by SMI's active landfill gas collection system. A significant portion of the collected landfill gas is sold to Seneca Energy II, LLC (SE), which beneficially uses the gas to fuel its electric power plant that is located across State Route 414 from the landfill on a defined parcel leased from SMI. SE's power plant is permitted separately by the Department as a Title V facility under 6 NYCRR Subpart 201-6. SE is another party whose interests would be affected by this ruling. SE's principal place of business is located at 2999 Judge Road, Oakfield, New York 14125.

SMI owns, operates, and maintains all of the landfill gas collection system, which provides the necessary vacuum, control and adjustment for gas control at the landfill. The system delivers collected landfill gas to the SE power plant and/or to SMI flares and

is designed to allow for delivery of landfill gas to other end users should that be economically feasible in the future. SE plays no role with respect to the landfill gas collection systems or the flares.

SE desires to add four Caterpillar G3520C internal combustion engines to its power plant (the Project) and shortly will file an application with the Department for permission to install the new engines under 6 NYCRR Subparts 231-6 (NANSR) and 231-8 (PSD) inasmuch as operation of the new engines would result in a NSR major modification for nitrogen oxides (NO<sub>x</sub>) and for carbon monoxide (CO). This application will replace the now-withdrawn April 2009 applications for the Project that had been submitted to the United States Environmental Protection Agency (EPA) and the Department. SE is resubmitting to the Department alone because of EPA's approval of Subpart 231-8 as part of New York's State Implementation Plan (SIP) that became effective on December 17, 2010 (see 75 Fed. Reg. 70140, 70143 (11/17/10)). The return of PSD authority to the Department means that the Project can be permitted with a single permit from a single agency.

### QUESTIONS PRESENTED

A key term in determining the scope of the applicability of Subparts 231-6 and 231-8 is "major facility," which for purposes of those subparts is defined in 6 NYCRR Subpart 201-2:

*(21) Major stationary source or major source or major facility. Any stationary source or group of stationary sources, any source or any group of sources, or any facility or any group of facilities, that are located on one or more contiguous or adjacent properties and are under common control, belonging to a single major industrial grouping and that are described in subparagraph (i), (ii), (iii) or (iv) of this paragraph....*

6 NYCRR § 201-2.1(b)(21) (emphasis added).

What constitutes “under common control” and whether SMI’s landfill and SE’s power plant are “under common control” are the questions presented. Depending on the answer to the latter question, different permitting requirements will attach to SE’s application for this Project and to any subsequent projects it or SMI might undertake at their respective facilities.

SMI and SE contend that their respective facilities are not under common control. For its part, the Department evaluated the relationship of the facilities at EPA’s request several years ago and concluded that SMI’s and SE’s facilities were independent and thus not under common control. See May 13, 2008 letter from David J. Shaw (DEC) to Raymond Werner (EPA), p. 4 (Exhibit A). To SMI’s knowledge, EPA never responded to or challenged the findings in the Department’s May 13, 2008 letter. Moreover, on two occasions during recent inspections of the landfill and SE’s power plant (April 18-19, 2006 and March 22-26, 2010), EPA asked SMI and SE to explain why the facilities were not under common control, and each time EPA inspectors left satisfied that the facilities were not under common control.

However, a December 1, 2010 e-mail from Department staff to landfills and energy recovery facilities like SE’s in Region 8 has injected an element of uncertainty with respect to the Department’s position on common control generally. See December 1, 2010 e-mail from Michele Kharroubi (DEC) to multiple recipients (including SMI and SE) (Exhibit B). This e-mail does not consider the facts specific to SMI and SE discussed in this petition.

Given that authority to implement NANSR and PSD is fully vested now in the Department as a result of EPA’s recent SIP approval, the Department has full authority to

make common control determinations for major facilities in the State. Accordingly, SMI requests that the Department reaffirm its prior determination that SMI's landfill and SE's power plant are not under common control, as that term is used in 6 NYCRR § 201-2.1(b)(21).

### COMMON CONTROL ANALYSIS

Historically, in order to assess “the power of one business entity to affect the construction decisions or air pollution control decisions of another business entity” for purposes of determining whether two facilities should be treated as one “stationary source,” EPA had stated that it would be guided by the Securities and Exchange Commission (SEC) definition of “control” in 17 CFR § 240.12b-2 (“control” is power to direct or cause the direction of the management and policies of a person (or organization or association)...through the ownership of voting shares, contract or otherwise”).<sup>1</sup> 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980). In the intervening years, a number of states and EPA Regions have started their “common control” analyses with the SEC definition. See, e.g., Letter from Richard R. Long (EPA) to Margie Perkins (Colorado DPHE), p. 2 (Oct. 1, 1999) (“EPA has applied this guiding [SEC] definition in numerous determinations over the past nineteen years”) (Perkins Letter) (Exhibit C).<sup>2</sup>

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<sup>1</sup> Indeed, the definition of “control” currently used by EPA in connection with Clean Air Act Section 120 noncompliance penalties is identical to the SEC’s definition. See 40 CFR § 66.3(f).

<sup>2</sup> The Perkins Letter states that “EPA has looked to see if control has been established through ownership of two entities by the same percent corporation or subsidiary of the percent corporation” and “considered whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of a second entity.” Id. Both of these two questions seem apt and appropriate under the SEC definition. However, the Perkins Letter goes on to note two additional questions that EPA also asked in making “common control” determinations: “EPA has also looked for a contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract” and “considered whether there is a support or dependency relationship between the two entities, such that one would not exist ‘but for’ the other.”

*(Footnote continued on next page)*

To our knowledge, only one court has evaluated a common control determination in the context of the SEC definition. In Winnebago Industries, Inc. v. Iowa Department of Natural Resources, Case No. CVCV01608, Slip Opinion at 7-12 (District Ct. Hancock Co., June 1, 2009) (Exhibit D), the court reviewed Iowa DNR's common control analysis for two Winnebago facilities that manufactured recreational vehicles, adjacent to which CDI, LLC, a custom painting company, provided painting services for Winnebago's vehicles in separate CDI-owned facilities under service agreements. In determining that the Winnebago and CDI facilities were separate facilities, the court held:

When one considers the words from the SEC definition together and in context it becomes apparent that a company having "common control" must have the right, or at least be given permission, to somehow actually *participate* in the other company's decision-making...the basic concept of control requires, at a minimum, some showing of an entitlement to be involved in a company's decision-making.

Slip opinion at 11 (italics in original). Evaluating the Winnebago/CDI relationship, the court found that there was "no evidence of Winnebago having any right or permission to be involved in the pollution-control decisions of CDI."<sup>3</sup> Id. at 11-12. Here, SMI and SE are individually responsible for the operation of their landfill and power plant,

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*(Footnote continued from previous page)*

These latter two questions inappropriately deviate from the SEC definition (which, we note, is the only basis for "common control" evaluations that EPA has adopted through notice and comment rulemaking), and thus would not be a legally permissible basis on which to find "common control." That said, the facts here demonstrate that 1) SMI does not sell all its landfill gas to SE as some is flared by SMI and some will be sold to others and 2) as explained in response to Question 13 on pages 8-9 supra, there is not a dependency relationship between the two entities beyond that found in typical business relationships from which both entities benefit.

<sup>3</sup> The court acknowledges the existence of the "single purchaser" and "dependency" factors mentioned in the Perkins Letter but states that they should not become "litmus tests." Id. Rather, they should be used to understand whether one entity is "susceptible to influence in its decision-making" by the others. Id.

respectively, and nothing in their Title V permits nor the Gas Sale Agreement and Lease between them suggest otherwise. Indeed, the Gas Sale Agreement places the responsibility for air pollution control at the power plant on SE (as does the Lease) and at the landfill on SMI. Under the Winnebago approach to “common control” therefore, the SMI and SE facilities are separate.

Some states and EPA regions have utilized a slightly different framework for common control analyses, one that was first laid out in a September 18, 1995 letter from William A. Spratlin (EPA) to Peter A. Hamlin (Iowa DNR) (the Hamlin Letter) (Exhibit E). Like the guidance utilizing the SEC definition, the Hamlin Letter offers an analytical framework to address the question of whether a facility located on the site of a major stationary source “should be considered part of the existing major source or as a separate entity” in the context of the “common control” criterion in the definition of “stationary source.” Hamlin Letter at 1.

For whatever reason, the Hamlin Letter overlooks EPA’s adoption of the SEC definition of “control” and instead cites to Webster’s Dictionary’s definition of “control” (“to exercise restraining or directing influence over,” “to have power over,” “power or authority to guide or manage,” “the regulation of economic control”) before encouraging permitting authorities to ask a series of questions about how the two facilities interact with each other. Hamlin Letter at 1. The Hamlin Letter acknowledges that “common control” evaluations need to be done on a case-by-case basis and that its list of questions is not exhaustive, but rather only a screening tool. Id. at 1, 2.

Although SMI believes that the approach based on the SEC definition is the appropriate and only legally sustainable analytical framework for common control

analyses, we lay out below the Hamlin Letter's list of questions with SMI's answers thereto:

- 1) Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board executives?**

No, the SMI and SE facilities do not share any of these personnel.

- 2) Do the facilities share equipment, other property, or pollution control equipment?**

No, the SMI and SE facilities do not share any of these items, except that the parcel on which SE's facility is located is leased from SMI.

- 3) What does the contract specify with regard to pollution control responsibilities of the contractee?**

The Gas Sale Agreement between SMI and SE places the responsibility for air pollution control at the power plant on SE and at the landfill on SMI. In addition, the Lease between the parties makes SE responsible for the compliance of its operations on the leased premises with all applicable laws. Redacted versions of the Gas Sale Agreement and the Lease are Exhibit F.

- 4) Can the managing entity of one facility make decisions that affect pollution control at the other facility?**

No.

- 5) Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?**

No, the SMI and SE facilities share none of these.

- 6) Do the facilities share intermediates, products, byproducts, or other manufacturing equipment?**

The facilities do not share manufacturing equipment. SMI has the right to purchase every year up to an agreed amount of electricity generated by SE's power plant. SMI has purchased limited rights to the waste heat generated by SE's power plant.

- 7) Can the new source purchase raw materials from and sell products or byproducts to other customers?**

Yes. SE's engines can run on natural gas, which SE can purchase from others; in fact, there are three major natural gas pipelines within three miles of the power

plant, with the closest being along Route 414 directly in front of the power plant. SE can and does sell its electric output to others through the New York Independent System Operator Day Ahead Market.

**8) What are the contractual arrangements for providing goods and services?**

The details are spelled out in the Gas Sale Agreement between SMI and SE and summarized in the answer to Question 14.

**9) Who accepts the responsibility for compliance with air quality control requirements?**

Each entity is responsible for the compliance of its own facility with applicable laws, including air pollution control requirements. Each facility has its own Title V permit with attendant record keeping, reporting, and certification requirements.

**10) What about for violations of the requirements?**

Each entity would be responsible for any violations of air pollution control requirements at its facility.

**11) What is the dependency of one facility on the other?**

Neither facility is solely dependent on the other, as described below.

**12) If one shuts down, what are the limitations on the other to pursue outside business interests?**

None. If SMI were not selling landfill gas to SE, SE has the ability to purchase pipeline gas on the open market to fuel its power plant. If the SE power plant were to shut down, SMI has the ability to flare the landfill gas or sell its gas to others.

**13) Does one operation support the operation of the other?**

One does not enter into a business relationship with another unless there is a mutual benefit to be gained, so, in that sense, each facility supports the other. However, there is nothing in the definition of "control" that suggests that parties in a mutually beneficial business relationship "control" each other. SE has the ability under the Gas Sale Agreement to discontinue taking landfill gas from SMI at any time if gas is adversely affecting SE's operating or if economic conditions warrant it. Because its engines can combust natural gas and given the proximity of major pipelines, as noted above, SE has the ability to fuel the power plant on

natural gas instead of landfill gas.<sup>4</sup> For its part, SMI does not and could not reply on SE to purchase all the gas generated by the landfill; some must be flared, and some will have to be sold to entities other than SE.

**14) What are the financial arrangements between the two entities?**

SE purchases landfill gas from SMI to fuel SE's power plant at a price specified in the Gas Sale Agreement between the parties. As consideration for that pricing structure, SMI leases the power plant premises to SE, and SE has sold to SMI limited rights to the waste heat from the power plant. The revenue that SMI receives from SE for the purchase of landfill gas is insignificant in comparison to the revenue that SMI receives for waste disposal.

The Hamlin Letter suggests that a "yes" answer to what it terms "the major indicators of control" (Questions 1 and 5) probably should lead to a finding of "common control." Hamlin Letter at 2. Those questions are answered in the negative here. Absent positive answers to the major indicator questions, the Hamlin Letter cautions that a "significant number" of positive answers to the non-major questions would be required before common control can be found. *Id.* That is not the case here (note that a positive answer to Question 7 augers against "common control"), so, as with the framework based on the SEC definition, the facts do not support a "common control" finding if the Hamlin Letter framework is used. There is no evidence that either SMI or SE can "exercise restraining or directing influence over," "have power over," "have power of authority to guide and manage," or can "regulate the economic activity" of the other entity.

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<sup>4</sup> Seizing on a statement in SE's now-withdrawn April 2009 application to EPA that natural gas would not be used in the four proposed new engines, EPA Region 2 stated, on the basis of this "fact" alone, that it would presume that SMI "has control over the electricity generation operations" of SE. *See* March 2, 2010 Letter from Steven C. Riva (EPA) to Peter H. Zeff (Innovative), p. 1 (Exhibit G). Under the Hamlin Letter framework, this single "fact," even if true, would not support a "common control" finding.

Although the Department must make this and all other common control determinations on a case-by-case basis, an advisory determination on common control made by EPA Region III with respect to the USA Waste's Maplewood Landfill and the adjacent INGENCO power plant in Virginia may be instructive. See May 1, 2002 Letter from Judith M. Katz (EPA) to Gary E. Graham (VADEQ) (the Graham letter) (Exhibit H).<sup>5</sup> There, as here, the landfill owner owned and operated the landfill gas collection system and flare; landfill gas not used by the power plant was flared; the power plant could burn fuels other than landfill gas; and the landfill owner and the power plant owner had no financial interest in each other, shared no equipment, had no common employees, and were responsible only for their own facility's compliance responsibilities. Id. at 2-3. These factors were integral to EPA Region III's determination that there was not common control of the two facilities. Id. at 4.

In those circumstances where a landfill and adjacent power plant have been determined to be under common control, key facts existed that distinguish those circumstances from the USA Waste/INGENCO and SMI/SE cases. Thus, in the case of a Virginia landfill discussed in a February 1998 letter from EPA Region III to Virginia DEQ, the common control finding turned on the fact, not present here, that the power plant owner also owned and operated the gas collection system at the landfill, meaning that the power plant owner was exclusively responsible for the collection and control of the landfill's landfill gas. See February 11, 1998 Letter from Makeba A. Morris (EPA) to

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<sup>5</sup> The determination was advisory only because, as EPA Region III properly noted, Virginia has SIP-approved PSD and Title V programs, and therefore the determination of common control was Virginia's to make. Graham Letter at 4.

Terry Godar (VADEQ), p. 5 (Exhibit I). In the case of the Al Turi Landfill here in New York, the key fact that was important to EPA Region 2 in asserting the existence of common control was the power plant owner's ownership and physical possession of the backup flares, making it the exclusive controller of the landfill's compliance with its air pollution control responsibilities. See July 8, 2004 Letter from Jane M. Kenny (EPA) to Erin M. Crotty (DEC), Attachment at 3-4 (Exhibit J). Here, SMI owns, has permitted, and operates the flares, not SE. Finally, in the case of the DANC Solid Waste Management Facility, also here in New York, the key fact that was important to EPA Region 2 in asserting the existence of common control was that the power plant would never be fueled with other than landfill gas. See April 27, 2009 Letter from Steven C. Riva (EPA) to Peter H. Zeliff (Innovative), p. 2 (Exhibit K). Here, as noted in the answer to the Hamlin Letter's Questions 7 and 12, SE has access to natural gas to fuel its engines and would use it under the right circumstances.

**SE'S POWER PLANT PROVIDES SIGNIFICANT ENVIRONMENTAL BENEFITS**

If SE's power plant were not available to it and SMI was unable to sell its landfill gas to another entity or entities, SMI would flare its landfill gas. Although both combusting landfill gas in a power plant and in flares converts the methane (a very potent greenhouse gas) in the gas to carbon dioxide (a less potent greenhouse gas), thereby significantly reducing the methane's global warming potential, landfill gas-fired power plants further reduce emissions of NOx, sulfur dioxide, and mercury by displacing electricity generated by traditional fossil-fueled power plants. See Natural Resources Defense Council, "Is Landfill Gas Green Energy?," available at [www.nrdc.org/air/energy/lfg/execsum.asp](http://www.nrdc.org/air/energy/lfg/execsum.asp). According to EPA, the effect of operating a

typical 3 MW landfill gas-fired power plant would equal reducing annual greenhouse gas emissions from 24,400 passenger vehicles, offsetting the use of 670 railroad cars of coal, or offsetting the carbon dioxide emissions from using 14.3 million gallons of gasoline. See EPA, "Landfill Gas Benefits Calculator," available at [www.epa.gov/lmop/projects-candidates/lfge-calculator.html](http://www.epa.gov/lmop/projects-candidates/lfge-calculator.html). Of course, the output of SE's power plant, if its four proposed engines are permitted, will be 24 MW, with the result that its environmental benefits would be eight times greater than those cited above.

The Department should be encouraging, not discouraging, landfills to work with power plant developers to enter into mutually beneficial relationships to assure that more, not less landfill gas is used for the production of electricity. This is especially so since the Department has singled out landfill gas capture and destruction projects as one of only five types of projects eligible for the award of carbon dioxide allowances under the Department's Regional Greenhouse Gas Initiative regulations. See 6 NYCRR § 242-10.3(a)(1). In addition, New York's State Energy Plan, adopted in 2009, expanded the Renewable Portfolio Standard's goal of increasing electric generation from renewable resources to 30 percent by 2015; landfill gas-fired power plants like SE's will be needed to contribute toward that goal. See State Energy Planning Board, 2009 State Energy Plan, pp. 45-46, 51 (Dec. 2009).

Here, a landfill owner and a power plant developer that have completely unrelated ownership and management have negotiated at arms length a mutually beneficial business relationship that provides significant benefit to the environment. A decision by the Department to require SMI and SE to treat the landfill and the power plant as one

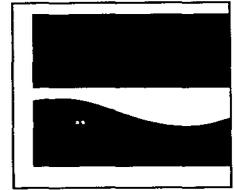
facility would chill the development of this type of meritorious and environmentally beneficial project in the State.

### **CONCLUSION**

On the basis of the foregoing analysis, SMI respectfully requests a declaratory ruling that SMI's and SE's facilities are not "under common control" as that term is used in 6 NYCRR § 201-2.(b)(21).

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March 13, 2008

Mr. Raymond Werner, Chief  
Air Programs Branch  
United States Environmental Protection Agency  
Region 2  
290 Broadway  
New York, NY 10007-1866

**Common Control Determinations in the Permitting of Landfills and companion  
Gas-To-Energy Operations**

Dear Mr. Werner:

In response to your correspondence of July 18, 2006, we have tabulated the information you requested for the purpose of making and validating common control determinations for landfills and companion gas-to-energy (GTE) operations. These tables identify and assess the issue of common control for all traditional and bioreactor municipal solid waste (MSW) landfills that have air permits in New York State. This has been done in accordance with the guidance provided in your letter.

The USEPA first identified common control as a potential permitting problem in October of 2002 from petitioners that objected to the proposed NYSDEC Title V permit for the Al Turi Landfill. These petitioners asserted that the Al Turi Landfill and its companion GTE operation, Al Turi LFGTE-1, should be treated as a single source for the purpose of determining NSR and Title V applicability. Upon review, EPA agreed with the petitioners because the landfill and its companion GTE operation were under common control. EPA then wrote the above referenced July 18<sup>th</sup> letter to determine if there might be other municipal solid waste landfills in New York State with GTE operations that did not address all applicable Federal requirements because of a common control relationship.

Table A is a listing of all traditional and bioreactor municipal solid waste (MSW) landfills that have air permits in New York State. This table lists information associated with the permitted landfill; permit ID, facility name, permit status, permit renewal number, modification number, permit expiration date, permit type (Title V or State), Standard Industrial Classification (SIC) code, 6 NYCRR Part 208 and/or 40CFR60 Subpart WWW applicability and whether or not there is a pending modification or renewal. Additionally, the table lists information associated with the gas generated from the landfill; LFG disposal method (Gas disposition) and the LFG Recovery permit ID, type (Title V or State) and SIC code of any Gas-To-Energy (GTE) operations not covered in the landfill permit. The table is subdivided into three sections; those landfills having GTE operations with separate permits, those with GTE operations included in the landfill permit, and those not having any GTE operations. This data was assembled and cross-checked with several different databases to assure accuracy and completeness.

Table B is a listing of the nine permitted landfills that may be affected by the issue of common control. It is a sub-set of Table A and contains all permitted MSW landfills that have separate operating permits for both the landfill and GTE operations. Each of these landfills and landfill GTE operations were evaluated against the three common control determination criteria presented in your July 18<sup>th</sup> letter:

- (1) Are both facilities operating under common control? (Y/N)?
- (2) Are the landfill and GTE facilities located on adjacent or contiguous properties?(Y/N)?
- (3) Do the landfill and GTE facilities share the same two-digit SIC code? (Y/N)?

All three of these criteria must be met before the landfill and GTE operations are to be considered a single source for the purpose of NSR and Title V applicability. The criteria assessments are summarized in the three columns on the right side of Table B.

Each landfill/GTE operation was then prioritized by the three groups outlined in your letter. These groups are stated below:

- (1) Landfills that are currently scheduled for permit review.
- (2) Other landfills that may require a single Title V permit for both the landfill and GTE operations because of an unrecognized common control relationship.
- (3) Those remaining landfills with separate permitted GTE operations.

### **Schedule of Common Control Determination**

The schedule for making and/or validating the common control determinations is presented below and prioritized by group category. Each of these landfills and associated GTE operation is located on adjacent or contiguous property and share the same two-digit SIC code. Thus, all nine of the Landfill/GTE facilities meet the second and third criteria of the common control determination. The first criterion, common control, is therefore, the critical factor that determines which facilities should be considered as a single source for the purpose of NSR and Title V applicability.

**Group 1: Landfills currently scheduled for permit review.** Group 1 contains the two landfill permits that are currently scheduled for permit review. These facilities will be given the highest priority for resolving any outstanding determinations of Common Control.

The Modern Landfill has been SAPA extended. This landfill and its associated GTE facility (Model City) are not under common control and thus fail the first criterion of the common control determination. Therefore, no further action is required as both facilities were treated properly as separate Title V facilities for the purposes of NSR.

Brookhaven Landfill has also been SAPA extended. However, we have not determined the common control relationship between the Brookhaven Landfill and its associated GTE facility. This relationship will be reexamined in the current round of permit renewals and the potential issue of common control will be noted in the application's description box of the Department's Application Review & Permitting (DART) System. The Permitting and Compliance Section will track the progress in establishing the relationship between these two facilities.

The Albany Landfill permit is not included in this list of separate GTE permits. Their renewal is currently under review and preliminary reports indicate the GTE operation will be separated from the landfill permit. Staff will make a common control determination for these operations when the landfill permit is reviewed. The Permitting and Compliance Section will track progress.

Permit Facility_Name (Landfill)	Expires	Type	SIC	Permit Facility Name (LFG Recovery)	Type	Assoc SIC	Pending Mod/Re n	Common Control	Property Adj/Cont	SIC match
Permit Facility_Name9.10200120674e+21										
929240001600053 MODERN LANDFILL INC	4/9/07	AT V	495 3	929240011000002 MODEL CITY ENERGY FACILITY	AT V	491 1 351 9	Y	N	Y	Y
147220003000020 BROOKHAVEN LANDFILL & RECYCLING AREA	8/31/07	AT V	495 3	147220079900006 BROOKHAVEN LANDFILL GAS RECOVERY FACILITY	AT V	491 1	Y	?	Y	Y

**Group 2: Landfills/GTE which currently have a State Operating Permit.** Group 2 identifies the two landfills and companion GTE facilities that have both Title V and State Facility permits. The group will be given the next-highest priority for addressing issues related to Common Control. No assessment of common control has been made for either of these landfill/GTE operations.

The common control relationship between Oceanside Solid Waste Management and Oceanside Landfill Gas will be reexamined during this current round of permit renewals. The potential problem issue will be noted in the DART application description box and we will track the progress in determining the common control relationship.

The relationship between the Broome County Nanticoke Landfill and the Broome County LFG Recovery facility will be reassessed. The potential problem issue will be forwarded to the Regional Air Pollution Engineer and we will track the progress in determining the relationship.

Permit Facility_Name (Landfill)	Expires	Type	SIC	Permit Facility Name (LFG Recovery)	Type	Assoc SIC	Pending Mod/Re n	Common Control	Property Adj/Cont	SIC match
128200043500005 OCEANSIDE SOLID WASTE MANAGEMENT FAC	5/1/07	AT V	495 3	128200247900027 OCEANSIDE LANDFILL GAS RECOVERY FACILITY	ASF	491 1 495 3	N	?	Y	Y
703990002700009 BROOME CO NANTICOKE LANDFILL	5/17/12	AT V	495 3	703990001100003 BROOME COUNTY LFG RECOVERY	ASF	491 1	N	?	Y	Y

**Group 3: Remaining Landfill/GTE facilities.** This group consists of the five remaining landfill and GTE facilities that have current Title V permits and no pending renewals. All of these facilities, with the exception of the Al Turi Landfill and LFGTE facility, are independently controlled, and thus, fail the first criterion of the common control determination. No further action is required for any of these facilities with regard to Title V applicability and NSR.

The Al Turi Landfill and LFGTE operation was issued two Title V permits under one facility ID as a result of a positive determination of common control. The Landfill permit expires in 2011 whereas the GTE permit expires in 2012. No further action is required for this facility as the positive determination did not subject the facility to NSR or additional Title V requirements.

Permit Facility_Name (Landfill)	Expires	Type	SIC	Permit Facility Name (LFG Recovery)	Type	Assoc SIC	Pending Mod/Re n	Common Control	Property Adj/Cont	SIC match
333300018400001 AL TURI LANDFILL & LFGTE FACILITY	8/7/11	AT V	495 3	333300018400002 AL TURI LANDFILL & LFGTE FACILITY	ATV	493 1	N	Y	Y	Y
622520000700015 DANC SOLID WASTE MANAGEMENT FACILITY	8/14/11	AT V	495 3	622520001800001 INNOVATIVE ENERGY SYSTEMS	ATV	491 1 351 9	N	N	Y	Y
845320002300041 SENECA MEADOWS SWMF	3/22/12	AT V	495 3	845320007500029 SENECA ENERGY LFGTE	ATV	491 1 351 9 495 3	N	N	Y	Y
832440000400007 ONTARIO CO LANDFILL	5/24/12	AT V	495 3	832440004000002 ONTARIO LF GTE FACILITY	ATV	491 1 351 9	N	N	Y	Y
401260003300009 COLONIE - T LANDFILL	10/12/1 2	AT V	495 3	401260060200001 INNOVATIVE ENERGY SYSTEMS	ATV	491 135 19	N	N	Y	Y

Please contact Eric Wade of the Permitting and Compliance Section (518-402-8403) should you have any questions about this submission. He, or his staff, will address any outstanding issues.

Sincerely,

/S/

David J. Shaw  
Director, Division of Air Resources

cc: John Higgins  
Robert Stanton  
Eric Wade  
Nick Onderdonk-Milne  
Regional Air Pollution Control Engineers

Enclosures

1. 7/18/06 Letter, Werner to Shaw, Common Control Determinations in the Permitting of Landfills and Companion Gas-To-Energy Operations.
2. Table A: NYS MUNICIPAL SOLID WASTE LANDFILLS, January 5, 2008.
3. Table B: NYS MUNICIPAL SOLID WASTE LANDFILLS WITH SEPARATE GAS-TO-ENERGY PERMITS, January 5, 2008.

Table A

## NYS MUNICIPAL SOLID WASTE LANDFILLS

January 5, 2008

Permit ID	Permit Facility Name (Landfill)	Permit Status	Ren #	Mod #	Expiration	PMT Type	SIC	Gas disposition	Permit Facility Name (LFG Recovery)	PMT Type	Assoc. SIC	Part 208	Sub-Part www	Mod/Ren Pending
<b>Landfills with separate GTE permit</b>														
929240001600053	MODERN LANDFILL INC	SAPA Extended	0	0	4/9/2007	ATV	4953	GTE, flare	929240011000002	ATV	4911, 3519	N	Y	Y
147220003000020	BROOKHAVEN LANDFILL & RECYCLING AREA	SAPA Extended	0	1	8/31/2007	ATV	4953	GTE, flare	147220079900006	ATV	4911	Y	N	Y
333300018400001	AL TURI LANDFILL & LFGTE FACILITY	Issued	0	3	8/7/2011	ATV	4953	GTE, flare	333300018400002	ATV	4931	Y	N	N
128200043500005	OCEANSIDE SOLID WASTE MANAGEMENT FAC	Expired	0	0	5/1/2007	ATV	4953	GTE	128200247900027	ASF	4911, 4953	Y	N	N
703990002700009	BROOME CO NANTICOKE LANDFILL	Issued	0	0	5/17/2012	ATV	4953	GTE, flare	703990001100003	ASF	4911	N	Y	N
622520000700015	DANC SOLID WASTE MANAGEMENT FACILITY	Issued	1	0	8/14/2011	ATV	4953	GTE proposed, flare	622520001800001	ATV	4911, 3519	N	Y	N
845320002300041	SENECA MEADOWS SWMF	Issued	1	0	3/22/2012	ATV	4953	GTE, flare	845320007500029	ATV	4911, 3519	N	Y	N
832440000400007	ONTARIO CO LANDFILL	Issued	0	1	5/24/2012	ATV	4953	GTE, flare	832440004000002	ATV	4911, 3519	N	Y	N
401260003300009	COLONIE - T LANDFILL	Issued	0	0	4/19/2006	ATV	4953	GTE, flare	401260060200001	ATV	4911, 3519	N	Y	N
<b>Landfills with GTE within same permit</b>														
147280062800015	BLYDENBURGH ROAD LANDFILL	SAPA Extended	0	0	4/3/2007	ATV	4953	GTE dropped, flare				Y	N	Y
147340016900005	SMITHTOWN LANDFILL GAS RECOVERY FACILITY	Issued	0	0	n/a	ASF	4911	GTE				N	N	N
264990002900151	STATEN ISLAND LANDFILL	Issued	1	0	8/15/2011	ATV	4953	GTE, flare, supply				Y	N	N
401010017100013	ALBANY LANDFILL	SAPA Extended	0	3	4/19/2006	ATV	4953	GTE, flare				N	Y	Y
509460004900008	CLINTON COUNTY REGIONAL LANDFILL	Issued	0	0	8/2/2009	ATV	4953	GTE proposed, flare				Y	N	N
725380001702000	MADISON COUNTY LANDFILL - R&D COMPOST	Issued	0	0	n/a	AFR	4931	GTE, flare				N	N	N
826480001400011	RIGAMILL SEAT LANDFILL	Issued	1	0	9/10/2011	ATV	4953	GTE proposed, flare				N	Y	N
826560000800021	MONROE LIVINGSTON SANITARY LANDFILL	Issued	1	0	8/22/2011	ATV	4953	GTE, flare				N	N	Y
899080016200043	HIGH ACRES LANDFILL & RECYCLING CENTER	Issued	1	0	6/6/2011	ATV	4953	GTE, flare				N	Y	N
914620000100013	CHAFFEE LANDFILL	SAPA Extended	0	0	6/4/2007	ATV	4953	GTE proposed, flare				N	Y	Y
<b>Landfills not having GTE</b>														
147260049000011	110 CLEAN FILL DISPOSAL SITE	Working Copy	0	0	n/a	ASF	4953	flare				N	N	Y
260060012700001	PELHAM BAY LANDFILL	Issued	0	0	n/a	AFR	4953	flare, venting				N	N	N
261050068700001	FOUNTAIN AVENUE LANDFILL	Issued	0	0	6/28/2011	ATV	4953	flare				N	Y	N
264030020700005	BROOKFIELD AVENUE LANDFILL	Issued	0	0	n/a	AFR	4953	flare				N	N	N
333300003700011	ORANGE COUNTY SANITARY LANDFILL	SAPA Extended	0	0	6/7/2007	ATV	4953	venting				Y	N	Y
348460007900019	SULLIVAN COUNTY LANDFILL	Issued	1	0	5/30/2011	ATV	4953	flare				N	Y	N
412560000802000	DELAWARE CO SOLID WASTE MANAGEMENT CENT	Issued	0	1	n/a	AFR	4953	flare				N	N	N
438170003202000	TROY - C MUNICIPAL LANDFILL	Issued	0	1	n/a	AFR	4953	flare				N	N	N
442220001902000	GLENVILLE - T LANDFILL	Issued	0	0	n/a	AFR	9511	flare, venting				N	N	N

Table A

## NYS MUNICIPAL SOLID WASTE LANDFILLS

January 5,2008

Permit ID	Permit Facility Name (Landfill)	Permit Status	Ren #	Mod #	Expiration	PMT Type	SIC	Gas disposition	Permit Facility Name (LFG Recovery)	PMT Type	Assoc. SIC	Part 208	Sub-Part WWW	Mod/Ren Pending
516990000300015	CFSWMA REGIONAL SOLID WASTE DISPOSAL FAC	Issued	0	1	n/a	AFR	4953	flare				N	N	N
517280000500006	FULTON COUNTY MUD RD SANITARY LANDFILL	Issued	0	0	7/12/2009	ATV	4953	flare				Y	Y	N
630130003002000	ONEIDA COUNTY LANDFILL	Issued	0	0	n/a	AFR	4953	flare				N	N	N
630240000900007	AVA LANDFILL	Issued	0	0	3/18/2009	ATV	4953	venting				N	Y	N
705010004200004	AUBURN (C) SANITARY LANDFILL NO.2	Proposed	0	0	n/a	ATV	4953	flare, incinerator				N	Y	Y
705010009500002	CITY OF AUBURN LANDFILL GAS UTILIZATION	Issued	0	0	n/a	AFR	4953	flare				N	N	N
708480000500004	CHENANGO CO LANDFILL - PHARSALIA	Issued	0	1	n/a	AFR	4953	flare				N	N	N
725380001100007	MADISON COUNTY LANDFILL	Issued	0	0	n/a	ATV	4953	flare				N	Y	N
807280000400017	CHEMUNG COUNTY LANDFILL	Issued	1	0	7/31/2010	ATV	9511	flare, venting				Y	N	Y
846240003100009	NEW BATH LANDFILL	Issued	0	0	2/13/2009	ATV	4953	flare				N	Y	N
846300001000011	HAKES C&D LANDFILL	Issued	0	0	n/a	ASF	4953	venting				N	Y	N
902320000300007	HYLAND LANDFILL	Issued	0	1	5/1/2015	ASF	4953	flare				N	Y	Y
904380000400013	SOUTHERN TIER SOLID WASTE MANAGEMENT	Working Copy	0	0	n/a	ASF	4953	flare				N	Y	Y
906360000600017	CHAUTAUQUA COUNTY LANDFILL	SAPA Extended	0	0	5/20/2007	ATV	4953	flare				Y	Y	Y
914300029900001	CASELLA WASTE SYSTEMS AT IWS SCHULTZ	Issued	0	0	n/a	AFR	4953	flare				N	N	N
914640014702000	NIAGARA LANDFILL INC - NIAGARA LANDFILL	Issued	0	0	n/a	AFR	4953	flare				N	N	N
929110011002000	CECOS - PINE AVE/PACKARD RD SITE	Issued	0	0	n/a	AFR	4953	venting				N	N	N

Permit Id = New York permit number.

Facility Name = Landfill Name.

Permit Status = Status of most recent permit.

Ren # = Renewal number of most recent permit.

Mod # = Modification number of most recent pmt.

Expiration = Permit expiration date.

PMT Type = Permit type (TitleV, State, Registration).

SIC = Standard Industrial Classification code.

Gas Disposition = Method of LFG destruction/dispersion.

Associated permit ID = New York permit number of GTE.

PMT type = Permit type (TitleV, State, Registration).

Assoc SIC = Standard Industrial Classification of GTE.

**Part 208** = Applicability\* of 6NYCRR Part 208 (Yes/No).

\*facilities receiving Municipal Solid Waste after 8 November 1987 and with a capacity of at least 2.5 Megagrams and a non-methane organic emission of 50 or more Megagrams per year.

**Subpart WWW** = Applicability\*\* of 40CFR60 Subpart WWW (Yes/No).

\*\*a facility receiving Municipal Solid Waste which was constructed, re-constructed, or modified on or after 20 May 1991.

**Pending Mod/Ren** = Permit action pending (Yes/No)

Table B

Sorted on Grouping then Permit Expiration Date

NYS MUNICIPAL WASTE LANDFILLS  
WITH SEPARATE GAS-TO-ENERGY PERMITS

January 5, 2008

Permit ID	Permit Facility Name (Landfill)	Expiration	PMT Type	SIC	Associated permit ID	Permit Facility Name (LFG Recovery)	Assoc PMT type	Assoc SIC	Pending Mod/Ren	Common Control	Property Adj/Cont	SIC match	Priority Group
929240001600053	MODERN LANDFILL INC	4/9/2007	ATV	4953	929240011000002	MODEL CITY ENERGY FACI	ATV	4911, 3519	Y	N	Y	Y	1
147220003000020	BROOKHAVEN LANDFILL & RECYCLING AF	8/31/2007	ATV	4953	147220079900006	BROOKHAVEN LANDFILL G.	ATV	4911	Y	?	Y	Y	1
128200043500005	OCEANSIDE SOLID WASTE MANAGEMEN1	5/1/2007	ATV	4953	128200247900027	OCEANSIDE LANDFILL GAS	ASF	4911, 4953	N	?	Y	Y	2
703990002700009	BROOME CO NANTICOKE LANDFILL	5/17/2012	ATV	4953	703990001100003	BROOME COUNTY LFG REC	ASF	4911	N	?	Y	Y	2
333300018400001	AL TURI LANDFILL & LFGTE FACILITY	8/7/2011	ATV	4953	333300018400002	AL TURI LANDFILL & LFGTE	ATV	4931	N	Y	Y	Y	3
622520000700015	DANC SOLID WASTE MANAGEMENT FACII	8/14/2011	ATV	4953	622520001800001	INNOVATIVE ENERGY SYST	ATV	4911, 3519	N	N	Y	Y	3
845320002300041	SENECA MEADOWS SWMF	3/22/2012	ATV	4953	845320007500029	SENECA ENERGY LFGTE	ATV	4911, 3519, 4953	N	N	Y	Y	3
832440000400007	ONTARIO CO LANDFILL	5/24/2012	ATV	4953	832440004000002	ONTARIO LF GTE FACILITY	ATV	4911, 3519	N	N	Y	Y	3
401260003300009	COLONIE - T LANDFILL	10/18/2012	ATV	4953	401260060200001	INNOVATIVE ENERGY SYST	ATV	4911, 3519	N	N	Y	Y	3

Permit Id = New York permit number.

Facility Name = Landfill Name.

Expiration = Permit expiration date.

PMT Type = Permit type (TitleV, State, Registration).

SIC = Standard Industrial Classification.

Associated permit ID = New York permit number of GTE.

Associated permit Name = GTE name.

Assoc PMT type = Permit type (TitleV, State, Registration).

Assoc SIC = Standard Industrial Classification of GTE.

Pending Mod/Ren = Permit action pending (Yes/No).

Common Control = Determination made (Yes/No).

Property Adj/Cont = Same or adjacent property.

SIC match = First two digits of SIC match (Yes/No).

Priority Group = This project's defined grouping.

B

**Taylor, Shaun**

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**From:** Michele Kharroubi [makharro@gw.dec.state.ny.us]  
**Sent:** Wednesday, December 01, 2010 11:24 AM  
**To:** carla.canjar@casella.com; Jerry.Leone@casella.com; Joe.Boyles@casella.com; Larry.Shilling@casella.com; SteveO@co.steuben.ny.us; Martin N. Miller; Tom Hasek; ezambuto@ieslfge.com; pzeliff@ieslfge.com; JRichardson@wm.com; rzayatz@wm.com; SDisalvo@wm.com  
**Cc:** JReed@bartonandloguidice.com; Snostrand@bartonandloguidice.com; bszalda@croworld.com; swilsey@croworld.com; William Doebler; dderenzo@derenzo.com; Alan Zylinski; Christopher LaLone; Kimberly Merchant; Lisa Porter; Michael Wheeler; Robert Stanton; Roger McDonough; Thomas Marriott; MGarland@monroecounty.gov; RBenway@monroecounty.gov; SPeletz@monroecounty.gov  
**Subject:** Permitting for Landfills and Energy Plants

To Landfill owners/operators and Landfill gas-to-energy owners/operators:

It has come to our attention that EPA Region 2 is not backing down on their one facility approach for landfills and energy plants as being the same facility. This is primarily due to their belief that these facilities are interdependent. The Division of Air Resources has been discussing this issue with EPA Region II for some time to no avail. Thus the issue should be directly negotiated with EPA Region II by the landfill and/or the energy plants. Once an agreement is reached (in writing), the Department will craft the appropriate language into the draft State Facility or Title V permits. Arguments that EPA **may** consider for being separate facilities is that the landfill maintains control of their flares and gas field (i.e., the energy plant does not adjust the well field or share personnel with the landfill); each facility has their own operational and financial control, no land or ownership lease exists, the plant has the ability to burn another fuel and a pipeline that could be brought to the plant, etc...

At this point in time, DEC's default position will be to consider all current and future applications to be under one facility unless the USEPA has made a pre-determination that they are separate. This combined facility approach will require additional modeling, if applicable, as all emission sources from both facilities need to be included. Any current applications will need to be updated to include the necessary information from both the landfill and the energy plant as well as modification application signatures from both owners. Processing of any current applications will be suspended until this information is received. The PTE's and actual emissions of both the landfill and the energy plant(s) will be combined for NSR purposes. For enforcement purposes, each entity is likely to be given a fixed emission cap, however, temporary adjustments can be allowed verbally for operational flexibility. Having separate Title V permits (one for the landfill and one for the energy plant) may still be done, however, the owner's name would be the same on each permit. The separate permits would not be done to avoid NSR issues. Agreements on enforcement issues should be developed between the landfill and the energy plant since any NOV's will be issued to the owner of the Title V or State Facility Permit.

Please advise me as to the direction you will be taking. Modeling questions should be directed to Leon Sedefian at (518) 402-8403. Other questions should be directed to me at (585)226-5312.

Sincerely,

Michele A. Kharroubi, P.E.  
Environmental Engineer II  
Division of Air Resources

C



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**  
**999 18<sup>TH</sup> STREET - SUITE 800**  
**DENVER, CO 80202-2488**  
<http://www.epa.gov/region08>

October 1, 1999

Ref: 8P-AR

Ms. Margie Perkins, Director  
Air Pollution Control Division  
Colorado Department of Public Health Environment  
4300 Cherry Creek Drive South  
Denver, CO 80246-1530

Re: Source Definition Issue for KN Power/Front Range Energy Associates, LLC/PSCo  
Generating Facility

Dear Ms. Perkins:

This letter outlines the U.S. Environmental Protection Agency's (EPA's) views on whether the proposed power generating facility at Fort Lupton (Facility) to be constructed by Front Range Energy Associates (Front Range) and the existing generating facility at Fort Lupton owned by Public Service Company of Colorado (PSCo) constitute a single source for purposes of permitting under the prevention of significant deterioration (PSD) program of the Clean Air Act ("Act") (42 U.S.C. § 7401 *et seq.*, § 7475). We have reviewed information presented by KN Energy, Inc. and Quixx Corporation, the two owners of Front Range, in letters, in documents, and in the meeting we held with the companies, the Colorado Air Pollution Control Division (APCD), and the state Attorney General's office on September 22, 1999. Based on this review, it is our interpretation of the PSD regulations that the Facility and existing PSCo generating facility constitute a single source. As the PSCo facility is a major source for PSD, see 40 C.F.R. § 51.166, it is also our interpretation of the relevant regulations that the Facility, if constructed as proposed, would be a major modification of this major source and therefore, is subject to the requirement to obtain a PSD permit in accordance with section 165 of the Act and 40 C.F.R. § 51.166(i) through (r).

The operative definitions for "major stationary source" and "stationary source" in 40 C.F.R. § 51.166(b) include the following provision:

(6) *Building, structure, facility, or installation* means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).



See also, Colorado Air Quality Control Commission Regulation 3.Part A.I.B.59 (“Source Definitions”). We understand there to be no dispute that the Facility belongs to the same industrial grouping as the PSCo facility and that the two facilities are located on adjacent properties. The issue is whether the two facilities are under the control of the same person. We believe that they are. Our analysis supports a finding that control by PSCo is established by the power supply agreement between Front Range and PSCo which obligates Front Range to provide electricity to PSCo on demand. Control is also indicated by ownership interest in the Facility held by PSCo’s parent company, New Century Energies, Inc. Because the pollutant emitting activities of the Facility and the existing PSCo facility are under the control of the same person, or persons under common control, the two facilities should be treated as a single source for purposes of regulation under the Act. Our analysis follows.

**1. PSCo has control over the Facility through contract:** EPA regulations do not supply a definition of “control.” Instead, EPA is guided in making case-by-case source determinations by the definition of “control” found in the regulations of the Securities and Exchange Commission (SEC”). See 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980). The SEC definition provides:

Control is 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.

17 C.F.R. § 240.12b-2. EPA has applied this guiding definition in numerous determinations over the past nineteen years. In the past, EPA has looked to see if control has been established through ownership of two entities by the same parent corporation or subsidiary of the parent corporation. EPA has also considered whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of a second entity. EPA also has looked for a contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract. Finally, EPA has considered whether there is a support or dependency relationship between the two entities, such that one would not exist “but for” the other. Such determinations are factually driven. We believe that the facts related to the proposed Facility evidence control through contract.

Front Range has a power supply agreement with PSCo (dated April 30, 1999) to provide “all the net generating capacity available at any time at the Facility” to PSCo. For the next seven years, Front Range may not sell power from the proposed Facility to anyone other than PSCo. The Facility is claimed to be a “peaking station,” which will provide all the power it can generate and all that PSCo requires at times of high electricity use, in order to prevent “brown-outs” in the Denver metropolitan area. The Facility has no other function than to supply power to PSCo during such times. Under the agreement, PSCo will pay Front Range an amount sufficient to guarantee a profit, even if the facility sits idle and is never used.

In addition to this evidence of a dependent buyer-seller relationship based on a single purchaser contract, there is evidence that PSCo has the authority under the agreement to exert direct control over operations of the Facility. The power supply contract provides that PSCo's system-wide control center has "the sole right" to determine start-up, shut-down, and levels of electricity generation at the Facility. To that end, a direct connection will be established between PSCo's system-wide control center and the Facility that will allow the facility to be "remotely started and stopped" by PSCo. PSCo thus will exert decision-making authority over the day-to-day operations of the Facility. Moreover, the facility must be sited to allow PSCo to easily interconnect the facility into PSCo's power transmission system, requiring the facility to be collocated with or located near an existing PSCo facility. PSCo will supply all the fuel (natural gas) to be used at the Facility, free of charge to Front Range. Front Range will rely on PSCo to provide interconnection to PSCo's existing gas pipelines, as well as to PSCo's transmission lines. Thus, Front Range is dependent on PSCo for its fuel as well as for purchase and delivery of its product.

Given these facts, EPA believes that generation of electrical power at the Facility -- the essential function of the facility and the source of its air pollution emissions -- is under the control of PSCo. PSCo exerts control over the Facility, as that word has been applied by EPA in prior circumstances.

One could draw an analogy to a manufacturer who decides to increase production but, instead of adding additional production capability to its existing plant, contracts with another company to build a second plant next door. For example, Company A, which paints widgets, might wish to increase its output of painted widgets at times of high demand. Company A contracts with Company B to build two new painting lines on adjacent property owned by Company B. Company A will buy all of Company B's output, but Company B may only paint widgets when ordered by Company A. Furthermore, Company A supplies all the paint and all the widgets to be painted by Company B. Company A controls both input and output. To make the agreement workable, Company A pays Company B a certain amount for sitting idle in between rush orders. In essence, Company A is contracting to use Company B's paint lines, like leasing a vehicle. Alternatively, one could say that Company B's facility is an annex to the Company A plant, an adjunct facility that allows Company A to increase production at a nearby site. If there were no contract, one could say that Company B's facility is independent of Company A's, that it has the capability of painting and selling widgets to other customers. That it "stands alone." But, given the contract between the two, Company A has control over painting activities at Company B's plant and thus over its air polluting activities. In terms of air pollution control regulation, Company B's facility must be considered part of Company A's facility.

Similarly, PSCo needs to add electrical generating capacity, apparently under an order by the Colorado Public Utilities Commission (PUC). Rather than build a peaking station at the existing Fort Lupton facility, PSCo has contracted with Front Range to build and operate a peaking station several hundred yards away. PSCo will determine when power must be

generated at the new facility and will purchase all the power. PSCo will determine when the new facility will be started up, when it will be shut down, and at what levels it will generate electricity. PSCo will not only relay orders to the Facility, to bring it on line or take it down, but will have the ability to start and stop operation of the Facility at any time by throwing a switch at PSCo's own remote control center. Since PSCo has the power to determine when the Facility will operate and at what levels it will generate electricity, PSCo controls the emission of pollutants from the facility. PSCo therefore has the "power to direct or cause the direction of the management and policies" of another entity with respect to the very activities which the Clean Air Act regulates, that is, with respect to the other entity's "pollutant emitting activities."

We believe that the facts presented strongly support a finding that PSCo controls the Facility through the power supply agreement. Because PSCo exerts such control, the proposed Facility is properly considered a modification to the existing PSCo facility at Fort Lupton.

**2. The existing PSCo facility and the proposed Front Range facility at Fort Lupton are under the control of persons under common control:**

The ownership relationship between PSCo and Front Range provides additional evidence of common control. Front Range is a limited liability company, which is owned by two entities, FR Holdings (FRH) and Quixx Mountain Holdings (Quixx). FRH, in turn is a wholly owned subsidiary of KN Power Company, which is a wholly owned subsidiary of KN Energy, Inc. On the other side of the company, Quixx is a subsidiary of Quixx Corporation, which is a subsidiary of New Century Energies, Inc (New Century). New Century is also the parent company of PSCo, which is its wholly-owned subsidiary. Thus, the same parent company owns PSCo and one of the two owners of Front Range.

Letters from Martha Rudolph, attorney for KN, dated September 22 and 27, 1999, appear to place significant weight on the fact that FRH, an entity not related in its corporate structure to PSCo, "will possess virtually all responsibility for, and control of, the operations of the Project." First, as discussed above, EPA believes that PSCo exerts significant direct control over the Facility under the contract agreement. Second, for the reasons discussed below, we do not necessarily agree that the limited liability agreement conclusively prevents Quixx, an entity related to PSCo in its corporate structure, from having managerial and operational responsibilities at the Facility.<sup>1</sup>

We understand that a contractual relationship has been established between a New Century subsidiary, Quixx and FRH through the limited liability company agreement that created Front Range. We believe that the current ownership relationship of the two parties is

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<sup>1</sup> Here, as in the case of Dupont and Dupont Dow Elastomers, EPA agrees that Front Range may not be considered a subsidiary of New Century or of one of its subsidiaries. See letter from Steven C. Riva, Region 2 Air Programs Branch Permitting Chief, to Michael L. Rodburg, Esq. (November 25, 1997).

50 percent/50 percent, but that the agreement may be amended to create a 49 percent/51 percent relationship. Under the amended agreement, Quixx would have 49 percent voting interest, presumably to eliminate its ability to veto decisions by FRH, the managing entity. The agreement may be amended again, to create a 49 percent/49 percent two percent relationship with a third unnamed party, giving neither major owner voting control or veto power, but reinstating equal interest between the two.<sup>2</sup>

According to the limited liability company agreement (dated September 17, 1999; unsigned), FRH is the “sole manager” of the Facility. It appears from this agreement that Quixx has no role in management of day-to-day operations at the facility, particularly with respect to pollution control. As we have discussed, however, the power supply agreement already gives PSCo significant authority over facility operations. Indeed, it appears that even the “sole manager” (FRH) has little ability to manage actual operations of the facility, apparently being

limited to management of personnel and contracts and maintenance of the facility. Limiting Quixx’s authority in this sphere may be of relatively little significance given PSCo’s direct control pursuant to the contract.

Other pertinent facts we find problematic are that the limited liability agreement may be amended by agreement of the two owners, FRH and Quixx. Presumably such amendment could include lifting the limitation on Quixx’s involvement in operations. Furthermore, the manager of operations, now FRH, may be removed for cause by the unanimous vote of the non-manager owners. At present, Quixx is the only non-manager owner.

The fact is that the Facility is dependent on both owners, FRH and Quixx, who have undertaken to construct and operate an emitting facility and who, singly or together, may decide to disband the company, sell the property, declare bankruptcy, or make any other decision related to the existence or nonexistence of the project. The provisions of the agreement that wall off the Quixx side of the company from any authority over contracting with PSCo may satisfy PUC requirements, but similar walling-off with respect to operations may have no effect for purposes of PSD permitting. For PSD applicability, the issue is whether these two facilities are so separate in structure and control that their emissions should not be considered those of a single source; or, whether, in fact, an appearance of separate status is contradicted by actual connection(s) so significant and so intrinsic that the two should be treated as a single source of air pollution. We believe the latter is the case.

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<sup>2</sup> As noted before, the determination whether two facilities should be treated as a single source is factually driven. Historically, EPA has viewed the percentage of voting interest as important, but not the sole criterion. EPA guidance published in 1979 indicates that an ownership interest as low as 10 percent may result in control, while ownership of 50 percent necessarily results in control. See 44 Fed. Reg. 3279 (January 16, 1979). Other criteria must be considered.

### 3. Conclusion

Even if control may not be established solely through ownership, it is EPA's belief that the power supply agreement creates a contractual relationship that confers direct control on PSCo. Because both the proposed and existing facilities are under common control, have the same first 2-digit SIC code, and are adjacent, they together constitute a single stationary source. Thus, because the existing PSCo facility is a major stationary source and the new Facility will have potential emissions exceeding the PSD significance levels not only for nitrogen dioxide and carbon monoxide, but also for particulate matter, PM-10, and volatile organic compounds, it is EPA's interpretation that the Facility is a major modification for purposes of PSD applicability.

KN has urged EPA to consider this proposed facility differently than other adjacent sources with close connections through contract or ownership. Because of the regulated environment in which the Facility will operate, they urge us to use a different set of criteria for determining when one entity exerts so much control over another that two facilities may be considered a single source. It may be that the nature of utility regulation in Colorado makes our finding a foregone conclusion in this case -- or in any other where a generating facility locates near an existing power plant to which it is linked by ownership or control. That does not mean that the conclusion is an incorrect one. The purpose of the PSD program is to assure that industrial development will only be allowed in clean air areas when it is controlled in such a way as to minimize impacts of air pollution and preserve clean air resources. The criteria for source determination, developed through regulation, guidance, and many years of application, help assure that outcome. EPA believes that the result in this case is that PSD will be triggered for the Facility, unless the State issues a permit that effectively limits its potential to emit below PSD significance levels.

Sincerely,

/s/ Richard R. Long

Richard Long, Director  
Air and Radiation Program

cc: Martha Rudolph, KN Energy, Inc.  
Casey Shpall, Colorado Attorney General's Office  
Frank Prager, Public Service Company of Colorado

D

IN THE IOWA DISTRICT COURT FOR HANCOCK COUNTY

WINNEBAGO INDUSTRIES, INC.  
and CDI, LLC,

Petitioners,

vs.

IOWA DEPARTMENT OF  
NATURAL RESOURCES and  
IOWA ENVIRONMENTAL  
PROTECTION COMMISSION,

Respondents.

Case No. CVCV018608

RULING ON JUDICIAL REVIEW

2009 JUL -2 AM 9:51  
CLERK OF DISTRICT COURT  
FOR HANCOCK COUNTY

FILED

On the 1<sup>st</sup> day of June, 2009, the above-captioned matter came before the court for oral arguments. The hearing was conducted telephonically. The parties were represented by their attorneys of record.

CASE HISTORY

Winnebago Industries, Inc. (hereafter "Winnebago") is in the business of manufacturing and selling recreational vehicles. CDI, LLC (hereafter "CDI") is in the business of custom painting recreational vehicles. The Iowa Department of Natural Resources (hereafter "IDNR") has issued a number of air quality construction and operating permits to Winnebago and CDI based on the agency's determination that the two companies are under "common control" and thus should be treated as a "single major stationary source" for purposes of Prevention of Significant Deterioration and Title V permitting under the Clean Air Act. Winnebago and CDI appealed the IDNR determination and their cases were consolidated.

On October 25, 2006, the IDNR moved for summary judgment in the contested case proceeding, requesting that the ALJ find as a matter of law that Winnebago and CDI were a single stationary source. The ALJ granted the summary judgment in a ruling issued December 29, 2006. Winnebago and CDI appealed to the Iowa Environmental Protection Commission (hereafter "EPC"). A majority of the EPC commissioners could not agree to affirm or reverse the ALJ's proposed decision and, as a result, the ALJ's ruling became the final agency action by operation of law.

Winnebago and CDI commenced their first judicial review action on May 1, 2007. The Hancock County District Court issued a ruling reversing the agency's determination and remanded the case back to the agency "to determine whether either petitioner has the ability to control the pollution-control decisions of the other petitioner."

On remand, an evidentiary hearing was conducted on May 28 and 29, 2008. The administrative law judge concluded that Winnebago and CDI were under "common control" and as a result were a single stationary source. Once again, Winnebago and CDI appealed to the EPC and, as happened before, the commissioners were unable to agree on whether the ALJ's proposed decision should be affirmed and the ALJ's proposed decision became final as a matter of law. Winnebago and CDI filed a Petition for Judicial Review of that determination and that is the matter now before the court.

### **STATEMENT OF FACTS**

The Administrative Law Judge found the following facts pertinent to this case:

1. Winnebago is a publicly traded corporation with its principal place of business in Forest City, Iowa. It has been in the business of manufacturing

and selling recreational vehicles for 50 years. Winnebago has a second, smaller manufacturing facility in Charles City, Iowa.

2. CDI is an Indiana limited liability company founded in December 2001 with its principal place of business in Elkhart, Indiana. CDI owns and operates recreational vehicle surface coating facilities on property contiguous and adjacent to the Winnebago facilities in Forest City and Charles City.
3. In 2002 Winnebago entered into a five-year agreement with CDI with the intent to develop a long-term relationship. Winnebago granted CDI the exclusive right to paint Winnebago's products.
4. In April 2002 representatives of CDI, the DNR, and the Iowa Department of Economic Development met to discuss a number of environmental issues related to CDI's proposed business operations. No one from Winnebago attended the meeting.
5. On April 22, 2002, Christopher Rolling sent a letter summarizing the issues discussed at the April 12, 2002 meeting. The letter states:

*It is the [DNR's] understanding that CDI and Winnebago have a contract for CDI to paint assembled Winnebagos, thereby creating a support/dependency relationship between the two companies. CDI's operations support Winnebago's operations by painting a finish on the motor homes. At this time, Winnebago is the only customer for CDI and therefore is considered a wholly dedicated support facility.*

6. The DNR's staff had not seen and did not review or analyze the service agreement prior to sending the April 22<sup>nd</sup> letter to CDI. The letter advised CDI that since Winnebago was already classified as a major source, CDI would also be subject to the PSD requirements as a major source. The letter did not explicitly state that CDI and Winnebago were under common control.
7. Winnebago has not been involved in any of CDI's permit applications. Winnebago's environmental compliance officer did not know that DNR had determined that Winnebago and CDI were one single major stationary source until Winnebago attempted to add additional capacity to its Charles City facility in February 2003. Winnebago representatives have attended only one joint meeting with the DNR and CDI, which was a 2004 meeting to discuss the single stationary source issue.

8. CDI selects the type of paint to be applied to the Winnebago motor homes, and Winnebago selects the colors and designs. CDI uses Sherwin Williams paint even though Winnebago uses Dupont paint at its own painting facility. Jeffery Schwartz has used chemists and proprietary technologies from his paint company in Elkhart to manipulate CDI's coating system to obtain lower volatile organic compounds and hazardous air pollutants in order to meet the limits imposed on CDI in Forest City.
9. Winnebago does not pay for any of CDI's employees or for any of CDI's operating expenses. CDI's water and utility systems are separate from Winnebago. Winnebago does not own any of CDI's equipment or buildings and both companies have separate human resources, employee benefit plans, and accounting systems and accounting firms. CDI provides monthly financial statements to Winnebago which are presented to the Securities and Exchange Commission to verify that they are separate companies under separate ownership.
10. Over 99 percent of CDI's business at the Forest City facility is conducted on behalf of Winnebago. Over 98 percent of CDI's business at the Charles City facility is conducted on behalf of Winnebago. At Charles City, CDI also paints for individual retail customers who own a motor home (either a Winnebago or a competitor). CDI has also painted motor homes for a small manufacturer located in Humboldt, Iowa. Recently, CDI has created several designs for Liquid Glass, a boat manufacturer located in Sumner, Iowa.
11. On November 2, 2004, CDI general manager, Dave Nagel, informed DNR that CDI had exceeded all of its permit limits. Nagel told DNR that he proceeded with the changes without first obtaining permits because he had been waiting for a year and a half for the Title V permit and could not wait any longer because Winnebago was providing motor homes to him and he had to paint them. CDI later informed Winnebago senior management and their counsel that CDI was exceeding its permit limits.
12. While Winnebago does not have direct control over the start-up or shutdown of CDI's facilities, CDI's production volume is directly tied to Winnebago's production volume. CDI essentially operates as part of Winnebago's production line. When Winnebago's production levels increase, CDI's production levels and pollution emissions correspondingly increase. Conversely, when Winnebago's production levels decrease, CDI's production levels and pollution emissions decrease.

13. CDI has a support/dependency relationship with Winnebago, such that the CDI facilities would not exist at Forest City or Charles City but for its service relationship with Winnebago.

### STANDARD OF REVIEW

Iowa Code Section 17A.19 governs judicial review of final agency actions. When reviewing an agency action, the district court acts in an appellate capacity to correct legal errors committed by the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In suits for judicial review, the party asserting the invalidity of the final agency action bears the burden of demonstrating the invalidity. *Iowa Code § 17A.19(8)(a)*.

The district court is bound by the agency's findings of fact if they are supported by substantial evidence. *IBP, Inc. v. Iowa Employment Appeal Board*, 604 N.W.2d 307, 311 (Iowa 1999). "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. *Iowa Code § 17A.19(10)(f)(1)*. In determining whether a factual finding is supported by substantial evidence, the district court must review "the record as a whole." *Iowa Code § 17A.19(10)(f)*. To view the record as a whole, "the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from the finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses

and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. *Iowa Code § 17A.19(10)(f)(3)*.

However, courts are not free to interfere with an agency finding where there is a conflict in the evidence or when reasonable minds might disagree about the inference to be drawn from the evidence, whether it is disputed or not. *Stephenson v. Furnace Electric Co.*, 522 N.W.2d 828, 831 (Iowa 1994). Also, the reviewing court must "broadly and liberally" apply the agency findings in order to uphold, rather than defeat, the agency's decision. *Id.*

With respect to legal conclusions, the Iowa Supreme Court has held that the interpretation of a statute is always a matter of law to be determined by the court. *City of Des Moines v. Employment Appeal Board*, 722 N.W.2d 183, 191 (Iowa 2006). Under certain circumstances, the courts are required to give some deference to an agency's interpretation of a statute. *City of Marion v. Iowa Department of Revenue*, 643 N.W.2d 205, 206 (Iowa 2002). For example, a court will give deference to the agency's interpretation if the legislature delegates the interpretation of a statute to the agency. *Id.* However, when the legislature has not vested the interpretation of a statute to an agency, the court will not give deference to the view of the agency and will employ a "correction of errors at law" standard of review. *City of Des Moines v. Employment Appeal Board*, 722 N.W.2d at 191.

The IDNR is the agency of the state charged with the duty to "prevent, abate, or control pollution." *Iowa Code § 455B.132*. Power to issue permits for the construction or operation of new, modified, or existing air contaminant sources and for related control

equipment, is vested in the director of the IDNR. *Iowa Code § 455B.134(3)*. Thus, it follows that the permitting process, including the interpretation of relevant regulations and statutes, have been delegated to the IDNR. Accordingly, the agency's interpretation of the relevant statutes is entitled to some deference. However, that is not to say the court is bound by the ALJ's interpretation if it is shown to be incorrect.

### ANALYSIS

In the first judicial review it was determined, and the parties now agree, that the correct test for "common control" is found in the Securities and Exchange Commission's regulations at 17 CFR § 240.12(b)-2. The SEC definition provides:

The term control (including the terms controlling, controlled by and under common control with) 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, by contract or otherwise.

In making the "common control" determination, it is permissible to consider four factors historically used by the Environmental Protection Agency. They are: (1) whether control has been established through ownership of two entities by the same parent corporation or a subsidiary of the parent corporation; (2) whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of the second entity; (3) whether there is a contract for service relationship between the two entities in which one sells all of its product to the other under a single purchase or contract; and (4) whether there is a support or dependency

relationship between the two entities such that one would not exist "but for" the other. This determination is factually driven.

Winnebago and CDI argue that the initial district court decision by Judge Riffel precludes consideration of the Service Agreements (factor 3) between Winnebago and CDI. It is the opinion of this court that Judge Riffel's ruling does nothing more than identify the SEC definition of "control" as being applicable to this case. It also recognizes the appropriateness of considering the four factors utilized by the EPA. There was no express holding regarding the significance of the Service Agreement between Winnebago and CDI that precluded the ALJ from considering those agreements when making the "common control" determination. The Administrative Law Judge clearly recognized the applicability of the SEC definition of control as well as the propriety of considering the four EPA factors. The following language reflects that the ALJ correctly understood her role on remand:

*The district court ruling remanded this case back to the agency for hearing on the merits to determine whether Winnebago has the ability to control the pollution-control decisions of CDI. This necessarily requires application of the SEC definition of control, but application of the SEC definition does not preclude consideration of the four factors discussed in the EPA guidance documents as they relate to the specific facts presented in this case. (Ruling, page 25).*

The ALJ concluded, "The preponderance of the evidence in the record established that Winnebago possesses, indirectly, the power to control CDI's construction and pollution-control decisions at its locations in Forest City and Charles City." The facts

relied upon in reaching that conclusion are largely undisputed and can be simply summarized as follows:

- (1) CDI is contractually obligated to paint Winnebago's motor homes;
- (2) Winnebago is, for all practical purposes, CDI's only customer, making CDI entirely dependent on Winnebago;
- (3) CDI's pollution emissions are directly proportionate to the number of Winnebago motor homes being produced.

Simply stated, the question in this case is whether the ALJ correctly concluded a customer can be so significant to a supplier that the relationship gives rise to "common control" as that term is used in connection with the issuance of air quality permits. The parties agree, and the ALJ concluded, that this case does not involve "direct control". The two companies are separate and distinct entities. There is no evidence to suggest Winnebago participates to any extent in CDI's decision-making process. Thus, if Winnebago has any type of control it is "indirect" and exists merely because of Winnebago's status as CDI's "essential" customer. Whether this is sufficient depends on the meanings of "power", "direct or cause the direction", and "otherwise" as those terms are used in the SEC definition of "control". When a court engages in the process of interpretation words are to be given their common, ordinary meaning. *Iowa Department of Transportation v. Iowa District Court for Buchanan County*, 587 N.W.2d 774, 776 (Iowa 1998).

"Power" is defined as "the ability to act or produce an effect" or "the possession of control, authority, or influence over others". *Merriam-Webster Online Dictionary 2009*.

In a general sense Winnebago may have some type of power over CDI because of the fact

that Winnebago is so vitally important to CDI. Furthermore, there is a cause-and-effect relationship between Winnebago's RV output and CDI's pollution emissions which gives Winnebago the practical ability to "produce an effect". However, having "power" in a general sense is not what the SEC definition requires. It must be shown that Winnebago has the *specific* power to "direct or cause the direction of the management and policies" of CDI.

"Direct" means to "regulate the activities or course of" or "to request or enjoin with authority" or "to point out, prescribe, or determine a course or procedure". *Id.* The word "cause" means "to compel by command, authority or force". *Id.* It follows that "cause the direction of" refers to causing another to "direct". There is little doubt that CDI's management and policies are influenced by the fact that it is dependent on Winnebago for virtually all of its business. Presumably, CDI makes decisions that will allow it to meet its obligations to Winnebago. In that sense it might be argued Winnebago "causes" CDI's direction of management and policies even though Winnebago does not take part in CDI's decision-making. However, the concepts of power and directing seem more consistent with some type of involvement or participation rather than mere economic influence.

Finally, standing alone the word "otherwise" could mean "any imaginable way". The problem with giving it that meaning is that the SEC didn't use similar language but easily could have if an all-encompassing catchall were intended. The word is used in the same sentence and immediately follows "ownership of voting shares, contract" either of which would afford a party the legal right to participate. There would have been no

reason to specify voting shares and contract if no limitation were intended. The definition could have simply stopped after the word "association". Under the principle of *noscitur a sociis* the meaning of words in a statute are to be ascertained in light of the meaning of the words with which they are associated. Under the principle of *eiusdem generis* general words that follow specific words are tied to the meaning and purpose of the specific word. *State v. Iowa District Court for Warren County*, 637 N.W.2d 619, 621 (Iowa 2001). Therefore, it follows that "otherwise" refers to any other way one company might be enabled to actually become involved in another's decision-making.

When one considers the words from the SEC definition together and in context it becomes apparent that a company having "common control" must have the right, or at least be given permission, to somehow actually *participate* in the other company's decision-making. The court recognizes that the third and fourth EPA factors could be read to support a different conclusion. However, the factors are merely that – factors. If the presence of one or even two of the factors is determinative of the "common control" decision they become litmus tests as opposed to something to consider. This court believes that the factors merely recognize that a business such as CDI might be very susceptible to influence in its decision-making process by a company such as Winnebago. However, the basic concept of control requires, at a minimum, some showing of an entitlement to be involved in a company's decision-making.

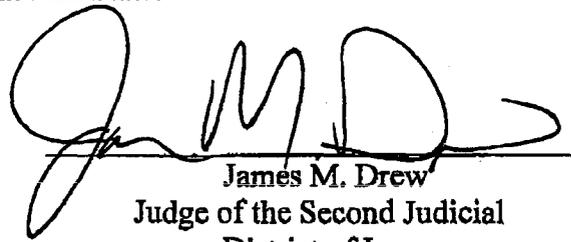
As stated previously, the facts of this case are really not in dispute. The ALJ's factual findings are supported by the record. However, her conclusion that Winnebago has "common control" is not supported by substantial evidence because there is no

evidence of Winnebago having any right or permission to be involved in the pollution-control decisions of CDI. Furthermore, there is no evidence to suggest Winnebago has done anything in an attempt to pressure or influence CDI's pollution decision-makers. Although Winnebago is a customer necessary to CDI's existence that, in and of itself, is not sufficient to establish "common control". It is the court's conclusion that the petitioners are not under "common control" and therefore cannot constitute a single stationary source for air permitting purposes. The ALJ erred in determining otherwise and thus the decision of the agency must be reversed.

**ORDER**

**IT IS THEREFORE ORDERED** that the final decision of the agency in this matter is reversed. The petitioners' operations do not constitute a single major stationary source for purposes of Prevention of Significant Deterioration and Title V permitting under the Clean Air Act. The agency shall issue permits consistent with this ruling.

The costs of this action are taxed against the State.

  
James M. Drew  
Judge of the Second Judicial  
District of Iowa

Clerk shall provide copies  
to counsel of record.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
726 MINNESOTA AVENUE  
KANSAS CITY, KANSAS 66101

SEP 18 1995

CON 10-22  
Prevention of  
Significant  
Deterioration  
CS

Peter R. Hamlin, Chief  
Air Quality Bureau  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
900 East Grand  
Des Moines, IA 50319

Dear Mr. Hamlin:

Recently, several questions have been raised about whether new facilities that locate on the site of a present major stationary source should be considered part of the existing major source or as a separate entity. In particular, concerns center around the question of control as interpreted under the New Source Review program. According to EPA's definition of a stationary source, "a building, structure, facility, or installation means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) ."

EPA's permit regulations do not provide a definition for control. Therefore, we rely on the common definition. Webster's Dictionary defines control as "to exercise restraining or directing influence over," "to have power over," "power of authority to guide or manage," and "the regulation of economic activity." Obviously, common ownership constitutes common control. However, common ownership is not the only evidence of control.

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. Therefore, we presume that one company locating on another's land establishes a "control" relationship. To overcome this presumption, the Region requires these "companion" facilities, on a case by case basis, to explain how they interact with each other. Some of the types of questions we ask include:

Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board of executives?

Do the facilities share equipment, other property, or pollution control equipment? What does the contract specify with regard to pollution control responsibilities of the contractee? Can the managing entity of one facility make decisions that affect pollution control at the other facility?

Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?

Do the facilities share intermediates, products, byproducts, or other manufacturing equipment? Can the new source purchase raw materials from and sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?

Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?

What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue outside business interests?

Does one operation support the operation of the other? what are the financial arrangements between the two entities?

The list of questions is not exhaustive; they only serve as a screening tool. If facilities can provide information showing that the new source has no ties to the existing source, or vice versa, then the new source is most likely a separate entity under its own control. However, if the facilities respond in the positive to one or more of the major indicators of control (e.g. management structures, plant managers, payroll, and other administrative functions), then the new company is likely under the control of the existing source, or under common control by both companies, and cannot be considered a separate entity for permitting purposes. Absent any major relationships, the new facility may still be considered to be under the control of the existing source if a significant number of the indicators point to common control.

If after asking the obvious control questions the permit authority has any remaining doubts, it may be necessary to look at contracts, lease agreements, and other relevant information. EPA's Dun and Bradstreet Retrieval System, available to anyone with mainframe access, is also useful for exploring any parent-subsidiary relationships and common corporate management

structures. Using these tools, we have found at least one case where a company set up an "unrelated" corporation in the middle of their property to split the property into multiple, distinct sites. After concluding that these "distinct" sites were in fact under the common control of the companion company's president, the split was later disallowed for permitting purposes.

The permit authority should be cautious of any short term or interim contracts that establish separate operating companies or separate operations on noncontacting parcels of land. While not likely, it is conceivable that such contracts could be used to shield the company's true intents. For example, a company may seek to avoid major new source review requirements in the short term, but merge later on to take advantage of the netting provisions. If the company's motives are unclear, but the permit authority elects to permit as two sources, we would encourage adding a condition to the permit requiring notification if the two sources merge operations. If the merger occurs within a short time frame, say two years, after permit issuance, the department may want to investigate such activities as circumvention of the major source permitting requirements and take the appropriate action.

If the affected sources are reluctant or refuse to provide documentation satisfactory to the permit authority, and the company's permit application is pending, then the permit authority may elect to find the permit application incomplete. If an application has not been submitted, then we recommend that the permit authority seek the necessary information under its statutory authorities.

Our approach to looking at control is based in part on regulatory background information, prior EPA guidance materials, common sense, and limited formal decisions on the matter. While no one single document answers the questions at hand, we encourage you and your staff to review the references listed in Table 1. Most are available on the New Source Review portion of the Technology Transfer Network Bulletin Board System.

We seriously urge you to consider the principles found in the various guidance documents and in this letter when evaluating requests to split properties for permitting purposes. We realize that in many cases it is easier not to second guess a company's motives. However, we also believe this administratively expedient approach can result in allowing circumvention of the permit requirements and ultimately jeopardize the goals and effectiveness of the permitting programs. This guidance has been reviewed by the Information Transfer and Program Integration Division, Office of Air Quality Planning and Standards, and

incorporates their suggestions and concerns. If you have any questions or need further advice, please contact our New Source Review team; Dan Rodriguez 913-551-7616, Ward Burns 913-551-7960, or Jon Knodel 913-551-7622.

Sincerely,

  
William A. Spratlin  
Director  
Air, RCRA, and Toxics Division

Enclosure

cc: Christine Spackman, IDNR  
Chuck Layman, KDHE  
Randy Raymond, MDNR  
Shelly Kaderly, NDEQ  
David Solomon, OAQPS  
Michele Dubow, OAQPS

Table 1. References on Common Control

"Definition of Source," March 16, 1979  
The preamble to the August 7, 1980 PSD regulations, 45 FR  
52693-52695  
"PSD Applicability Request (General Motors)," June 30, 1981  
  
"PSD Applicability Request, Valero Transmission Company,"  
November 3, 1986  
"PSD Applicability Determination for Multiple Owner/Operator  
Point Sources Within a Single Facility (Denver Airport)  
, August 11, 1989  
"Comments on Draft Permit for Conoco Coker and Sulfur  
Recovery Facility," March 22, 1990  
"Definition of Source for PSD Purposes," August 22, 1991  
"PSD Permit Remand, Reserve Coal Properties," July 6, 1992  
"Temporary and Contracted Activities at Stationary Sources,"  
John Seitz letter to Minnesota, November 16, 1994  
"Watts Bar Nuclear Plant Title V Applicability," Region 4,  
June 5, 1995  
"Site Specific Determination of Common Control for United  
Technologies Corporation," Region 4, July 20, 1995  
"Georgetown Cogeneration Project," Westy McDermid  
Memorandum, date unknown

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## GAS SALE AGREEMENT

This Gas Sale Agreement ("Contract") is entered into by Seneca Meadows, Inc. ("SMI"), a New York Corporation and Seneca Energy II, LLC, a New York Company (the "Company"). This Contract is dated as of August 29, 2006.

### PRELIMINARY STATEMENT

SMI owns and operates the Seneca Meadows Landfill ("Landfill") which occupies a portion of the SMI property ("Seneca Site") located in Seneca Falls, New York. The Landfill and Seneca Site are identified in Exhibit "A" hereto. SMI currently sells to SEI landfill gas produced at the Landfill for the fueling of SEI's existing 12Mw electric generation plant ("EGP").

The Company plans to construct and operate at the Company Site a modified electric generation plant ("MGP") that is anticipated to have a minimum Nameplate Capacity of 12 Mw and a maximum Nameplate Capacity of 24 Mw. SMI desires to grant to the Company the right, during the Term of this Contract, to purchase landfill gas ("LFG") generated by the permitted cells of the Landfill in sufficient quantities to fuel the MGP up to a maximum Nameplate Capacity of 24 Mw. During the construction of the MGP the Company plans to continue the operation of the EGP with the intention that at least a minimum of 12 Mw of electricity will be produced at all times. In order to provide for the continued production of 12 Mw, the Company intends to construct the MGP in phases. At the end of the first phase ("Phase I") the MGP will have a Nameplate Capacity of 6.4 Mw, at the end of the second Phase ("Phase II") the MGP will have a Nameplate Capacity of 12 Mw and at the end of the third phase ("Phase III") the Nameplate Capacity of the MGP will have been increased to 17.6 Mw. The construction of additional capacity at the MGP in excess of 17.6 Mw and up to a maximum of 24 Mw will be done at such time as the Company determines there is sufficient LFG to justify the expansion of the MGP. In order to construct an MGP with a Nameplate Capacity of 24 Mw, SMI is willing to dedicate to the Company LFG in sufficient quantities to fuel a 24 Mw MGP but only to the extent LFG is produced in sufficient quantities by the Landfill.

In connection with this Contract, SMI and the Company have entered into a Lease which grants to the Company certain leasehold rights to the Company Site on which the MGP will be located and operated, a copy of the Lease is attached hereto as Exhibit "B".

Under the terms of this Contract, SMI will operate and maintain the Collection System, the Production System and the Flare and will deliver the LFG to the Company at the new delivery point ("NDP") and to the Existing Delivery Point until the production of electricity is terminated at the EGP.

**NOW, THEREFORE**, in consideration of their mutual covenants set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, SMI and the Company agree as follows:

**ARTICLE I**  
**DEFINITIONS.**

- 1) **Collection System:** facilities at the Seneca Site provided and operated by SMI for the collection and/or extraction of LFG, including, without limitation, the wells (vertical and horizontal) drilled into the Landfill, well heads, interconnecting pipes, header pipe, condensate drips, and interconnections to the NDP and EDP, along with any ancillary materials and equipment, as they may be modified or repaired from time to time.
- 2) **Commercial Operation:** the generation of electricity at the MGP and the sale of the electricity to third parties occurring subsequent to the completion of all start-up and testing procedures and the successful integration of the MGP with the LFGMS.
- 3) **Commercial Operation Date:** the date (which is not later than December 31, 2007) that the MGP commences Commercial Operation at a capacity of 17.6 Mw, after notice by the Company to SMI of the satisfactory completion of all start-up and testing procedures and successful integration of the MGP with the LFGMS.
- 4) **Company Documents:** are as defined in Section 10.2(a) herein.
- 5) **Company Requirements:** the amount of LFG needed by the Company to operate the EGP and/or the MGP at their then installed and operating electrical generating capacity.
- 6) **Company Site:** that portion of the Seneca Site, identified in the Lease, on which the Company's MGP is to be located.
- 7) **Condensate:** liquid that is collected and consisting solely of that which is separated from the LFG during pressurization of LFG by one or more compressors prior to introduction into the electrical energy generating units.
- 8) **Environment:** all air, water, or water vapor, including surface water and ground water, any land, including land surface or subsurface, and includes all fish, wildlife, biota and all other natural resources or as defined in any local, state, federal law, rule, regulation, zoning ordinance, order, permit, approval, or authorization.
- 9) **Excess Production:** LFG produced from the Landfill in excess of the Company Requirements.
- 10) **EDP:** the existing delivery point for the delivery of landfill gas to the EGP located at the gas meter between the Collection System and the Production System of the EGP, as shown on Exhibit "C".
- 11) **EGP:** is as defined in the Preliminary Statement herein.

- 12) Flare: one or more devices, including the existing flare, to burn or otherwise destroy any LFG produced from the Collection System that is not utilized in the MGP.
- 13) Generating Facility: the building which houses the MGP.
- 14) Gas Purchase Agreement: is as defined in the Preliminary Statement hereto.
- 15) Hazardous Materials: any oil or other petroleum products, pollutants, contaminants, toxic or hazardous substances or materials (including, without limitation, asbestos and PCBs), and any hazardous wastes or other materials from time to time regulated under any applicable statutes, regulations, or ordinances governing pollution or the protection of the environment including, but not limited to, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act of 1976, and New York law, all as may be amended from time to time.
- 16) Landfill: is as defined in the Preliminary Statement herein.
- 17) Laws: Any local, state or federal law, rule, regulation, zoning ordinance, order, permit (including but not limited to all permits held by SMI for the operation of the Landfill and the Seneca Site), approval, or authorization.
- 18) Lease: the agreement between SMI and the Company granting the Company certain leasehold rights to the Company Site.
- 19) Lease Agreement: is as defined in the Preliminary Statement herein.
- 20) LFG: is as defined in the Preliminary Statement hereto.
- 21) LFGMS or Landfill Gas Management System: the Collection System and the Production System.
- 22) Nameplate Capacity: the manufacturer's electrical rating.
- 23) NDP: the new delivery point for the delivery of LFG to the MGP located at the gas meter between the Production System and the MGP shown on Exhibit "D".
- 24) MGP: the modified electric generation plant having a minimum Nameplate Capacity during Phase I of 6.4 Mw and a maximum Nameplate Capacity of 24.0 Mw consisting of (i) the Generating Facility, (ii) one or more electrical energy generating units to be designed and installed by the Company pursuant to the terms hereof and, that will be fueled by LFG from the Landfill, (iii) any transformers, switch gear, distribution lines, meters and related equipment necessary for the generation and delivery of electric energy to customers and, (iv) any expansions of the MGP permitted under the terms of this Contract.
- 25) Permits: is as defined in Section 2.1 herein.

- 26) Phase I, Phase II and Phase III: as defined in the Preliminary Statement hereto and more particularly in Article II Section 2.1 (b) hereof.
- 27) Production System: the SMI's facilities for the conveyance of LFG to the NDP, including without limitation, the main header pipe through which a blower creates suction to draw LFG from the Collection System, one or more blowers, filters, meters and interconnections to the Flare.
- 28) Project: the NDP and the MGP, together with all related equipment and facilities and interconnections to water, sewer, and utilities which are to be located on the Company Site.
- 29) Project Records: are as defined in Section 5.5 herein.
- 30) Seneca Site: is as defined in the Preliminary Statement herein.
- 31) SMI Documents: are as defined in Section 10.1 (a) herein.
- 32) Subcontractor: any entity with whom the Company contracts in order to perform services or provide equipment or materials in furtherance of the fulfillment of any obligation of the Company hereunder, including, without limitation, the Company's obligations to construct the Project.
- 33) Term: is as defined in Article III herein.

## ARTICLE II

### CONSTRUCTION OF PROJECT AND OPERATION OF THE EGP.

#### 2.1 Responsibilities of Company.

(a) The Company shall, at its expense, design, construct and test the NDP and the MGP. Construction shall commence on the MGP on or before July 1, 2007 and shall be completed in phases. The Company will have a 17.6 Mw of electric generation in Commercial Operation at the MGP on or before December 31, 2007. The Company, at its expense, shall obtain and maintain all governmental authorizations, approvals and permits necessary for the construction, maintenance, and full and partial operation of the Project, including but not limited to all zoning approvals and building permits (collectively, the "Permits"). As more fully provided in the Lease, the Company shall provide to SMI for its approval, which approval shall not be unreasonably withheld or delayed, a plan describing the Company Site with the MGP at maximum capacity and associated easements for electrical interconnection.

(b) The MGP shall be constructed in the following phases:

Phase I. The Company, at its expense, shall first construct the Generating Facility on the Company Site sufficient to house 17.6 Mw of electrical generation and the related ancillary equipment. The Generating Facility will be constructed in such a

manner that it may be expanded in order to house 24 Mw of electrical generation and the related ancillary equipment. Upon completion of the Generating Facility, the Company will install at the Generating Facility four (4) new 1600 kw generator sets and associated equipment sufficient to produce 6.4 Mw of electricity. The Company shall promptly notify SMI in writing of the Commercial Operation of the MGP with 6.4 Mw of capacity. Upon such notification, Phase I shall be deemed completed.

Phase II. Upon the completion of Phase I, the Company shall move seven (7) generator sets and associated equipment from the EGP to the Generating Facility. The generator sets shall then be installed for operation at the MGP. Upon installation, the MGP shall then have 12.0 Mw of capacity. The Company shall promptly notify SMI in writing of the Commercial Operation of the MGP with 12.0 Mw of capacity. Upon such notification, Phase II shall be deemed completed.

Phase III. Upon completion of Phase II the Company shall discontinue Commercial Operation at the EGP. The Company shall remove the remaining seven (7) generator sets and associated equipment from the EGP and install them at the MGP. Upon installation the MGP shall have 17.6 Mw of capacity. During Phase III, the Company shall remove all equipment previously used by it in the generation of electricity at the EGP leaving only the building which housed the EGP. At the end of Phase III such building shall be deemed the property of SMI. Phase III shall be completed on or before December 31, 2007 and any and all prior agreements relating to the EGP and related lease between the parties and their respective successors shall terminate. The Company shall promptly notify SMI in writing of the Commercial Operation of the MGP with 17.6 Mw of capacity, and removal by the Company of all equipment used by it in connection with the generation of electricity at the EGP. Upon such notification, Phase III shall be deemed completed.

(c) SMI acknowledges and agrees that the Company shall have the right to produce electricity at the EGP until the completion of Phase II.

(d) SMI acknowledges and agrees that upon completion of Phase III the Company shall have the right to expand the MGP to 24 Mw of capacity. The expansion of the MGP to 24 Mw of capacity from 17.6 Mw capacity shall be at the exclusive option of the Company, and may be done at any time in phases or all at once.

(e) At any time during the Term of this Contract, the Company shall give written notification to SMI immediately upon the Company's receipt of any notice (oral or written) alleging any violation of Law, including any violation of the Permits, by Company pertaining to the Project or the Seneca Site.

## 2.2 Responsibilities of SMI.

(a) SMI shall make all reasonable efforts to cooperate with the Company in order to facilitate (i) the Company's obtaining and maintaining any required Permits necessary for the construction, modification, operation and maintenance of the Project in conformance with

applicable Laws and, (ii) the coordination of the design, construction, operation and maintenance of the Project in conjunction with the operations at the Seneca Site.

(b) SMI shall continue to deliver LFG to the EDP until the completion of Phase II.

(c) \_\_\_\_\_ percent ( \_\_\_\_\_ %) of the cost of moving the electrical generation units at the EGP along with all associated equipment will be paid by SMI. The scope of the work involved in moving the electrical generation units from the EGP to the MGP is described on Exhibit "E" attached hereto. The Company will from time to time submit to SMI invoices reflecting the costs incurred for the move. SMI shall pay the Company its share of such invoices (50%) within thirty (30) days after the receipt of same. SMI acknowledges that a primary consideration for the Company's agreement to pay \_\_\_\_\_ % of the moving costs is the ability of SMI to obtain a permit to expand the Landfill so that the Project may be expanded to 24 Mw. In the event that SMI does not receive the expansion permit and the Project is not expanded to 24 Mw on or before January 1, 2012 due to insufficient LFG to justify such expansion, SMI agrees to reimburse the Company for all moving expenses incurred by the Company. SMI shall reimburse the Company for the full amount of the moving costs paid by the Company on or before March 1, 2012. If SMI does not obtain a Landfill expansion permit but there is sufficient LFG to justify an expansion of the Project to 24 Mw on or before January 1, 2012, then SMI shall only be responsible for \_\_\_\_\_ % of the moving costs. The determination of the amount of LFG sufficient to justify an expansion of the Project to 24 Mw shall be made by the parties acting in good faith and in a manner consistent with its past practices.

(d) During Phase I, and at all appropriate times thereafter during the Term of this Contract, SMI, at its sole cost and expense, will perform all work and supply all materials necessary to deliver to the NDP LFG necessary to meet the Company Requirements but only to the extent produced by the Landfill. This work will include, but not be limited to, the connection of the Collection System to the Production System and the NDP. The Company acknowledges that SMI is not guaranteeing that the Landfill will produce the amount of LFG necessary to meet the Company Requirements for the Term of this Contract.

(e) During Phase I, and if necessary, at all appropriate times thereafter during the Term of this Contract, SMI, at its sole cost and expense, will also be responsible for the supply and installation of all gas compressor equipment relating to the Flare and the Production System and the supply, installation, maintenance, repair and replacement of all underground high density polyethylene piping for the MGP, the Flare and the Landfill for the delivery of LFG to the NDP.

(f) SMI shall be responsible for all site preparation for the MGP, including, but not limited to, the clearing of trees, removal of topsoil, placement of structural fill to achieve an average elevation of 480 feet above sea level.

(g) SMI, at its expense, will be responsible for clearing a roadway from the MGP to Route 414.

2.3 Coordination of Project with Seneca Site Operations. During the Term, the Company shall make reasonable efforts to coordinate and cooperate with SMI regarding any permit and/or proceedings applicable to the Seneca Site or the Landfill. The Company shall not unreasonably interfere with any of SMI's activities and operations at the Seneca Site or the Landfill. During the Term, SMI shall make reasonable efforts to coordinate and cooperate with the Company regarding any Permits and/or proceedings applicable to the Project. SMI shall not unreasonably interfere with any of the Company's activities and operations at the Company Site or the EGP.

2.4 Fulfillment of Obligations. All of SMI's obligations hereunder shall be performed first to be in compliance with all of the necessary permits to operate the Landfill and second in a manner so as not to delay or interfere with the construction, maintenance and operation of the Project by the Company. If, as a result of force majeure, SMI is unable to perform its obligations in a timely manner, it shall immediately notify the Company and proceed in good faith and with due diligence to complete the performance of its obligations hereunder.

### ARTICLE III

#### TERM

3.1 Term. The term of this Contract (the "Term") shall commence upon the date first above written, and shall remain in full force and effect for the longer of twenty (20) years or, until such time, as in the Company's reasonable judgment, it is no longer economically viable for it to produce electricity at the MGP in the capacity of 4 Mw.

3.2 Obligations Following Termination. Upon expiration of the Term or sooner termination of the Contract, the Company and SMI shall satisfy all obligations that arose under the Contract up to the date of expiration or termination. Thereafter, neither the Company nor SMI shall have any continuing obligation under this Contract, except pursuant to the provisions of Sections 8.1, 8.2 and Article XI of this Contract which shall survive the expiration or termination of this Contract. The Company with the reasonable cooperation of SMI, shall within six (6) months after the expiration of the Term or the sooner termination of this Contract, remove all equipment at the MGP used in the generation of electricity at the Project including, but not limited to, electrical generating equipment, engines, generators, electric control equipment, switchgear, interconnection facilities, metering equipment, supplies and materials, spare parts etc., and shall peaceably and quietly leave the Seneca and Company Sites. Subsequent to the expiration of the aforementioned six (6) month period, the Generating Facility shall remain and become the property of SMI.

3.3 Option to Purchase. Upon expiration of the Term of this Contract, SMI shall have the option to purchase any equipment then in use at the MGP and used for the Project. The purchase price for the equipment shall be a price to be agreed upon by SMI and the Company and shall take into account the replacement cost of the equipment, the value of the equipment to an economically viable similar project over a fifteen (15) year period, the number of hours remaining until engine rebuilds are required, and any indebtedness associated with the equipment which must be assumed or paid in full by SMI. The option granted hereunder must be exercised within thirty (30) days after the expiration of this Contract with the closing to occur thirty (30)

days after such exercise. The option granted hereunder shall not be effective upon early termination of this Contract unless such termination is the result of an Event of Default of the Company, herein after defined.

#### ARTICLE IV

#### GRANT OF GAS RIGHTS, LICENSES AND EASEMENTS.

##### 4.1 Purchase and Sale of LFG.

(a) 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. SMI agrees to sell to and to provide to the Company, and the Company agrees to purchase from SMI, LFG to the extent needed by the Company to operate and sell electricity at (i) the EGP until the completion of Phase II and, (ii) the MGP up to the Company Requirements. SMI agrees to sell to the Company the LFG needed to operate the MGP at the 24 Mw capacity upon reaching such capacity. All LFG necessary to operate the EGP and the MGP at their then installed and operating electrical generating capacity is hereby dedicated to the Company provided such LFG is being used to operate the EGP and/or the MGP for the purpose of selling electricity and such quantity is being produced at the Landfill. If at any time there is Excess Production, SMI may use or sell such Excess Production subject to the dedication obligations to the Company contained herein. It is specifically agreed by SMI that SMI's right to use or sell is limited to the Excess Production only.

(b) SMI shall promptly notify Company by telephone, and confirm by letter the existence of any information which SMI may obtain concerning any condition, occurrence or circumstances including, but not limited to, operational problems with the Collection System, which could adversely affect SMI's ability to deliver the quantities of LFG covered by this Contract other than the natural depletion of LFG over time.

(c) The Company is hereby granted the right to regulate and absolutely control the LFG entering the EGP and MGP, including discontinuing same at any time if, in the reasonable opinion of Company, the LFG adversely affects the operations of the EGP or MGP or it is no longer economically viable to operate the EGP or MGP with LFG.

(d) The LFG sold to the Company shall have the characteristics and be in the quality necessary for the reliable operation of the electric generation, provided that the LFG is being produced by the Landfill and SMI is in compliance with its permits.

4.2 Ownership of LFG. SMI shall deliver LFG to the Company at the NDP and the EDP. SMI's obligation to deliver LFG to the EDP shall cease upon the completion of Phase II. SMI shall maintain legal and equitable title to any and all LFG before the NDP and the EDP. The Company shall assume legal and equitable title of the LFG at the NDP and the EDP.

4.3 Electricity. Upon execution of this Contract, the Company shall, upon SMI's request, make up to \_\_\_\_\_ kwh per year of electricity generated by the EGP and/or the MGP available to SMI for use in its operations at the Landfill. The cost of such electric energy shall

equal the amount of electricity supplied to SMI during that month measured in kwh multiplied by the \_\_\_\_\_ expressed in dollars per kilowatt hour (\$/kwh) received by the Company from the New York Independent System Operator Day Ahead Market during the month of production. All costs incurred for voltage regulation/transformation, wheeling and metering the electric energy from the EGP or MGP to the SMI facilities shall be paid for by SMI. This includes, but is not limited to, the installed costs of all meters, transformers and interconnects between the EGP and MGP and SMI's electricity system and any operation and maintenance costs associated therewith. The Company shall read the meter which reflects SMI's usage of electricity generated from the EGP and MGP on the last business day of each month. On or before the fifteenth day of the month next following the reading of the meter, the Company shall provide SMI with, (i) a statement evidencing the amount of electric energy used by SMI during the most recent billing period, (ii) reasonable verification of the average rate received by the Company from third parties during the billing period and, (iii) the total amount owing to the Company for such electric energy purchased by SMI. All amounts owing to the Company from SMI shall be paid in full within fifteen (15) days of the receipt of the aforementioned statement. In addition to the dedication of electricity as described above, the Company will supply the electricity for the Production System. This electricity will be supplied free to SMI for the prorated portion of the electricity necessary to operate the Production System to supply LFG to the MGP. Electricity supplied in excess of that necessary to operate the Production System for supply of LFG to the MGP will be paid for by SMI. The price paid by SMI shall equal the price described above.

4.4 Warranty of Title. SMI warrants that it is lawfully seized in fee simple of the Landfill and the LFG, that this Contract shall vest good and beneficial title in the Company to the LFG delivered at the NDP and the EDP, free and clear of any prior claims or encumbrances. SMI and its successors will warrant and defend the rights and interests granted herein to the Company against all claims of ownership of the delivered LFG.

## ARTICLE V

### USE OF RIGHTS AND MAINTENANCE.

#### 5.1 Operation and Maintenance of the Project.

##### (a) Operation and Maintenance.

(i) The Company shall operate and maintain the EGP and the Project. The Company shall give SMI written notice of the Commercial Operation Date. The Company shall operate and maintain the Project in accordance with all applicable Laws and good industry practice during the Term. The Company shall operate and maintain the EGP and the Project and perform all of its obligations under this Contract, in accordance with all Laws and all Permits, including without limitation any state or federal permits.

(ii) SMI, at its sole expense, shall be responsible for the installation, operation and maintenance of the Collection System, the Production System and the Flare, and the timely replacement of all or any part of the components thereof. The Company agrees to cooperate with the SMI in connection with its installation, maintenance and operation of the

Collection System, the Production System and the Flare and, further agrees, in connection therewith, to take all actions reasonably requested by SMI that are necessary or advisable in order to carry out the intent of this Contract. SMI will be responsible for the maintenance of the Landfill in accordance with all applicable Laws. SMI shall also be responsible for the maintenance, repair and replacement of all existing wells on the Landfill and for the supply, installation, maintenance, repair and replacement of all new wells on the Landfill necessary to provide LFG for the expansion of the MGP to a capacity of 24Mw.

(b) The Company shall maintain the EGP, the Project and the gas meter at the NDP and the EDP in compliance with good operating practices to ensure safe and reliable operation. All modifications to the Project of every sort and nature, and associated costs and expenses, shall be the responsibility and obligation of the Company unless caused by the acts or omissions of SMI in which event SMI shall be responsible for such costs and expenses.

(c) SMI shall maintain the Collection System, the Production System and the Flare in compliance with good operating practices to ensure safe and reliable operation. All modifications to the Collection System, the Production System and the Flare of every sort and nature, and associated costs and expenses, shall be the responsibility and obligation of SMI, unless caused by the acts or omissions of the Company in which event the Company shall be responsible for such costs and expenses.

(d) Design, Construction, Installation and Operational Compliance. The Company shall design, construct, install, maintain, and operate the Project in accordance with: (1) the terms and conditions of this Contract, (2) the final design and operation documents for the Project, (3) sound engineering, construction and operation practices, (4) generally accepted industry standards, and (5) all applicable Laws and Permits.

(e) Water Supply. SMI shall provide, at no charge to the Company, a water tap to the Company Site boundary of the MGP that meets the requirements set forth in Exhibit "F" to this Contract. The cost of the water supplied to the Company Site shall be the sole responsibility of the Company.

(f) Condensate. SMI shall, at its expense, provide for the disposal of the Condensate. In its sole discretion, SMI shall either pump Condensate generated by activities of the MGP and the EGP into the leachate collection system located at the Seneca Site or shall otherwise dispose of the Condensate. In either case, the disposal of Condensate shall be in conformance with all applicable Laws. The Company shall not permit any other liquid or other substance to be added to the Condensate, and the Company shall make all reasonable efforts not to discharge anything but Condensate into the leachate collection system. Condensate shall be free of compressor oils and Condensate shall not be generated using any screw compressor in which oil may mix with the condensate. SMI may stop Condensate from entering into its leachate collection system if either (i) the constituents of the Condensate are not in compliance with all Laws governing the leachate collection system or, (ii) SMI determines, that acceptance of Condensate will impair its ability to comply with any Law governing the leachate collection system or the Landfill.

(g) Collection System, Production System and Flare Modification. If subsequent to the date of this Contract, any Law or judicial or administrative decision would require modification of the Collection System, the Production System or the Flare to specifications for which such systems or Flare in operation at that time do not comply, then the costs of any required modifications shall be paid by SMI. SMI shall, at its expense, be responsible to make modifications to the Collection System, the Production System and the Flare if such modifications are necessary to maintain the permits for the operation of the Landfill.

(h) NDP and MGP Modification. If subsequent to the execution of this Contract, any Law or judicial or administrative decision would require construction or modification of the NDP or MGP, to specifications that do not comply with the NDP or MGP in operation at that time, and then the costs of any such modifications shall be paid by the Company. Provided such modifications do not jeopardize any permit required for the operation of the Landfill, nothing in this Contract shall be construed to require the Company to make any modifications to the NDP or MGP, if, in the Company's reasonable judgment, the cost of doing so makes the continued operation of the MGP unprofitable. In the event such modifications do jeopardize any permit required for the operation of the Landfill and the Company fails to make such modification, such failure will be considered a breach of the Contract under Section 6.1 (c).

5.2 Project Compliance. The Company shall build, operate, and maintain the Project in compliance with all applicable Laws and agreements, throughout the Term of this Contract. SMI shall operate and maintain the Collection System and Flare in compliance with all applicable Laws and agreements, throughout the Term of this Contract. Unless required by Law, SMI must obtain the prior approval of the Company, which approval shall not be unreasonably withheld or delayed, before making any modifications to the Collection System and Flare that will affect the operation of the EGP or MGP. If such modifications are required by Law, SMI shall provide immediate notice thereof to the Company.

5.3 Maintenance of the Company's Rights. SMI shall: (i) take reasonable steps to avoid violating any Permit required for the financing, construction, operation or maintenance of the Project and, (ii) use reasonable efforts to assist the Company, at Company's cost, in obtaining such additional Permits as may be required to develop and operate the Project.

5.4 Maintenance of SMI's Rights. Company shall: (i) take reasonable steps to avoid violating any Law required for the development, financing, construction, operation or maintenance of the Seneca Site or the Landfill and, (ii) use reasonable efforts to assist SMI, at SMI's cost, in obtaining any permits as may be required to develop, expand and/or operate the Seneca Site or the Landfill.

5.5 Documentation. The Company, at its cost and expense, shall maintain such books and records as are reasonably necessary to implement this Contract. The Company shall maintain such books and records at the Seneca Site as required by any Laws ("Project Records"). The Company shall at SMI's expense collect and provide available data from the EGP and the MGP to assist SMI in filing all reports that must be filed by SMI with federal, state, or local agencies concerning the Seneca Site or the Landfill. The Company agrees that SMI, or any duly authorized representative shall, until the expiration of the five (5) years after the Term of this Contract, have access to and the right to examine and copy any directly pertinent operating

records of the Company relating to the operations of the Project. The Company shall keep Project Documents for seven (7) years at which time the Company may destroy the Project Documents provided that at least ten (10) days prior to the destruction of any record, the Company shall offer to transfer the records to SMI; shipping costs, if any, to be at SMI's cost.

5.6 Exchange of Information. SMI and the Company shall keep each other informed of developments related to the Project on a timely basis.

5.7 Mutual Cooperation. The parties recognize the need for continued functional integration of the Project with the Landfill and associated operations. The parties understand and agree that each party shall provide reasonable assistance and cooperation to the other as may be required in order to (i) develop, construct, install, repair, maintain, and operate the Project and, (ii) preserve all Permits and comply with all Laws applicable to the Project, the Seneca Site, and the Landfill in the most cost-effective manner and SMI's responsibilities in owning and operating the Landfill, including making such modifications to this Contract that the parties deem reasonably necessary under applicable Laws or that are designed to carry out the parties' intents and purposes in entering into this Contract. Each party shall make good faith efforts to avoid interfering with the other party's operations and performance of its obligations at the Seneca Site. Neither SMI nor the Company has the authority to undertake obligations on behalf of the other.

5.8 Right of Entry. SMI shall have the right to inspect the Project during the Term. SMI shall make reasonable efforts to arrange inspection during normal business hours or at such other times as mutually agreed upon by the parties hereto, pursuant to the Company's reasonable terms and conditions so as to ensure the safety of entering personnel and to avoid unreasonable interference with the operation of the Project. Whenever practical, any such entry shall be upon not less than twenty-four (24) hours prior notice from SMI to the Company, except in the case of unforeseen circumstances, including but not limited to emergency response and unannounced governmental inspections, in which case no prior notice shall be required. The Company shall immediately inform SMI of any governmental inspector entering the Company Site, and SMI shall have an unqualified right to accompany any governmental inspector.

5.9 Waste Heat. In consideration of the payment structure for LFG set forth in Section 7.1, the Company acknowledges that ownership of the waste heat generated by the EGP and the Project shall rest with SMI, however it is understood by both parties that the Company shall have the first right to negotiate equitable compensation for the use of the waste heat, prior to it being offered for sale to another third party. All waste heat shall be subject to a right of first refusal to the Company before sale to any third party. Any offer to acquire the waste heat shall be in writing, shall be from a bona fide, unrelated third party purchaser, and shall be subject to this right of first refusal. Any such offer shall be presented to the Company and, thereafter, the Company shall have 10 days within which to exercise the right of first refusal herein stated. If the Company exercises such right of first refusal, the Company shall purchase the waste heat under the same terms and conditions as contained in the bonafide offer submitted to SMI by said third party. If the Company does not exercise the right of first refusal granted herein, SMI shall then have the right to sell the waste heat to the third party pursuant to the terms and conditions of the bona fide offer presented to the Company. All costs incurred in utilizing the waste heat will be paid by SMI or a third party user. Such costs shall include, but not be limited to, the costs of

design, engineering, equipment, installation, operation and maintenance. The design and engineering of all waste heat projects and the specifications for the equipment to be utilized in connection therewith must be submitted to the Company for its approval prior to the commencement of construction. The Company's approval shall not be unreasonably withheld or delayed. SMI agrees that the use of the waste heat and the installation of equipment necessary for its utilization will not be unreasonably interfere with the Company's operation of the MGP.

## **ARTICLE VI**

### **BREACH.**

6.1 **Breach by Company.** Upon the occurrence of any of the following circumstances, each constituting an "Event of Default" SMI shall have the right to (i) terminate this Contract or, (ii) seek appropriate damages as permitted either at law, in equity or otherwise under this Contract.

(a) **Imposition of Charges.** The failure of the Company to fully reimburse SMI within thirty (30) days of written notice from SMI of the imposition of any assessment, fee, or charge against SMI relating to the Project installation, maintenance, or operation which is the obligation of the Company hereunder.

(b) **Failure to Make Payments.** The failure of the Company to make any payment due to SMI pursuant to Article VII hereof within thirty (30) days after written notice from SMI demanding payment.

(c) **Failure to Operate or Maintain Consistent with Law.** The failure of the Company to bring the Project into compliance in all material respects with all applicable Laws within the time prescribed by any governmental agency or if no time is prescribed by any governmental agency, thirty (30) days after written notice from any governmental agency to the Company or SMI that the Company is not operating or maintaining the EGP and/or the Project in compliance with applicable Laws or that the Company's operation or maintenance of the EGP and/or the Project jeopardizes or delays SMI from receiving or maintaining any necessary permits to operate or expand the Landfill. Provided, however, that if the Company proceeds with due diligence during the time periods mentioned in (i) and (ii) above to bring the EGP and the Project into compliance with the applicable Laws and is unable to do so by reason of the nature of the work involved, its time to do so shall be extended for a period of time during which such work could reasonably be accomplished with due diligence and continuity as long as such extended period of time does not exceed the time prescribed by any governmental agency.

(d) **Failure to Commence Operation.** The failure of the Company to commence Commercial Operation of the MGP with a 17.6 Mw capacity on or before December 31, 2007, unless such failure is caused by the acts or omissions of SMI or the time period to commence construction has been extended pursuant to the provisions of Article XI of Section 11.2 hereof.

(e) **Failure to Maintain Insurance.** Failure of Company to reinstate insurance coverage required under Article VIII Section 8.3 hereof within thirty (30) days after written notice from either SMI or the insurance carrier indicating that a required policy(ies) has lapsed.

(f) Breach of Contract. The Company's failure to perform any of its other material obligations under this Contract within thirty (30) days after the receipt from SMI of written notice of such failure provided, however, that if the Company proceeds with due diligence during such thirty (30) day period to cure such failure, and is unable to do so within the thirty (30) day period by reason of the nature of the work involved, its time to cure the failure shall be extended for a period of time during which such cure could reasonably be accomplished with due diligence and continuity as long as such extended period of time does not, in SMI's reasonable judgment, jeopardizes or delays SMI from receiving or maintaining any necessary permits to operate or expand the Landfill operations.

6.2 Breach by SMI. Upon the occurrence of any of the following circumstances, each constituting an "Event of Default" the Company shall have the right to (i) terminate this Contract or, (ii) seek appropriate damages as permitted either at law, in equity or otherwise under this Contract.

(a) Imposition of Charges. The failure of SMI to fully reimburse the Company within thirty (30) days after written notice of the imposition of any assessment, fee, or charge against the Company relating to the Seneca Site, the Landfill, the Collection System or the Flare which is the obligation of SMI hereunder.

(b) Failure to Make Payments. The failure of SMI to make any payment due to the Company under this Contract within thirty (30) days of written notice from the Company demanding payment.

(c) Failure to Operate or Maintain Consistent with Law. The failure of SMI to bring the Landfill, the Collection System and Flare into compliance in all material respects with all applicable Laws within the time prescribed by any governmental agency or, if no time is prescribed by any governmental agency, thirty (30) days of written notice from any governmental agency to SMI that SMI is not operating or maintaining the Landfill, the Collection System or Flare in compliance with applicable Laws provided, however, that if the SMI proceeds with due diligence during the time periods mentioned in (i) and (ii) above to bring the Landfill, the Collection System or Flare into compliance with the applicable Laws and is unable to do so by reason of the nature of the work involved, its time to do so shall be extended for a period of time during which such work could reasonably be accomplished with due diligence and continuity as long as such extended period of time does not exceed the time prescribed by any governmental agency.

(d) Failure to Maintain Insurance. Failure of SMI to reinstate insurance coverage required under Article VIII Section 8.3 hereof within thirty (30) days after written notice from either the Company or the insurance carrier indicating that a required policy(ies) has lapsed.

(e) Breach of Contract. SMI's failure to substantially perform any of its other material obligations under this Contract within thirty (30) days after the receipt from the Company of written notice of such failure provided, however, that if SMI proceeds with due

diligence during such thirty (30) day period to cure such failure, and is unable to do so within the thirty (30) day period by reason of the nature of the work involved, its time to cure the failure shall be extended for a period of time during which such cure could reasonably be accomplished with due diligence and continuity as long as such extended period of time does not extend the time prescribed by any governmental agency, in the Company's reasonable judgment, jeopardizes or delays the Company from receiving or maintaining any necessary Permits to operate or expand the Project.

## ARTICLE VII

### LFG PAYMENTS.

#### 7.1 Payment Structure.

(a) LFG Payments. In consideration of supplying LFG to the EGP and the MGP during the Term, :

Each payment shall be made to SMI, by wire transfer or Company check to such account or accounts as SMI may specify (by written notice given the Company) within ten (10) days following the calendar quarter ending on the last business day of March, June, September and December of each year during the Term and shall include the payment calculated as aforesaid for all LFG supplied to the EGP and MGP for the quarter then ended. In the event SMI fails to provide wire transfer instructions, payment shall be made by check to the address listed in Section 12.6.

(b) For purposes of the following paragraphs, the term "Year 5" shall mean the year commencing on the fifth anniversary date after the MGP first commences Commercial Operation at a 6.4 Mw capacity subsequent to the completion of Phase I, and the term "Year 6" shall mean the year commencing on the sixth anniversary date after the MGP first commences Commercial Operation.

(c) Subsequent to Year 5, the Initial Base Rate will be adjusted annually to reflect increases in the cost of living. The first adjustment shall occur for Year 6 and an adjustment shall be made for each or partial calendar year thereafter during the Term. In the event the "Consumer Price Index" published by the Bureau of Labor Statistics of the U. S. Department of Labor, the then higher of either the Revised Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or the Consumer Price Index for all Urban Consumers (CPI-U) hereinafter called "CPI", or successor substitute index appropriately adjusted, reflects an increase in the cost of living over and above such costs as reflected by such Price Index as it exists for the first calendar month of Year 5 (the "First Month"), then, commencing with the first full calendar month of Year 6 and in each subsequent year during the Term, the Initial Base Rate for the

ensuing year shall be increased to reflect increases in the cost of living over the cost of living for the First Month. The Initial Base Rate for Year 6 and in each succeeding year during the Term shall equal the Initial Base Rate multiplied by 50% of a fraction (which in no event shall be less than 100%), the numerator of which shall be the published CPI for the first calendar month of Year 6 and thereafter the first calendar month of each succeeding year of the Term, and the denominator of which shall be the CPI for the First Month.

(d) Tax Credits. The Company shall \_\_\_\_\_ with SMI the value of any Internal Revenue Service, Section 45 tax credits, or any renewals or extensions thereof, which it claims on its federal income tax returns as a result of the generation of electricity at the MGP. The Company shall \_\_\_\_\_ of any potential tax credits available under the New York State Tax law which it claims on its New York State income tax returns as a result of the generation of electricity at the MGP. In addition, the Company agrees to \_\_\_\_\_ with SMI the net proceeds of any sale of greenhouse gas credits associated with the Project. In each case, the Company shall make a payment to SMI for its share of the value of the tax credits (or greenhouse gas credits) within 120 days of having filed its (the Company's) tax return for the year the tax credits (or greenhouse gas credits) are claimed. The parties acknowledge that Project must be placed in service before January 1, 2008 in order to qualify for Federal IRS Code Section 45 tax credits. Any sale of greenhouse gas credits by Company to any affiliate (entities controlling Company, controlled by Company or under common control with Company) shall be valued at the greater of fair market value and the actual net proceeds.

(e) Payment of Amounts. Except as specified in Section 7.1(a), above, all payments due and payable to SMI under this Contract shall be paid to SMI at the address set forth in Section 11.6 or as otherwise may be specified by SMI (by written notice given the Company).

7.2 Late Payments. Any payment due to SMI hereunder that is not paid within thirty (30) days of its initial due date shall be subject to a late payment penalty of 6% and shall bear interest from the initial due date to its date of payment at an annual rate of 6%.

## ARTICLE VIII

### INDEMNIFICATION AND INSURANCE.

8.1 General Indemnification. To the extent permitted by law, the Company and SMI each agree to indemnify, defend, and hold harmless the other, its agents, officials, officers, directors, and employees, from any and all losses, costs, expenses (including reasonable attorney fees and accountant fees), claims, liabilities, actions, or damages, including but not limited to, incidental, indirect, special or consequential damages, lost profits and similar claims, whether based on contract, tort, strict liability or any other theory or form of action, even if such party has been advised the possibility thereof and any liability for personal injury or property damage to third persons, arising out of or in any way connected with (i) acts or omissions of the indemnifying party or its employees, officials, agents, contractors and subcontractors in constructing and operating the EGP, Project, the Company Site or the Landfill, (ii) any

misrepresentation or breach of warranty by the indemnifying party of any representation or warranty set forth in this Contract; or (iii) any breach by the indemnifying party of any of its agreements, covenants or undertakings set forth in this Contract. Such indemnification shall not apply to claims, liabilities, actions, or other damages to the extent caused by any negligent or deliberate act or omission on the part of the other party or its employees, officials, agents, contractors or subcontractors. In no event shall either party have any liability to the other party for any exemplary or punitive damages. Additionally, there shall be no personal liability on the part of the officers of SMI or the Company or any successors in interest or designees thereof, with respect to any of the terms, covenants, and conditions of this Contract. The indemnities set forth in this Section 8.1 shall survive the termination or expiration of this Contract.

## 8.2 Environmental.

(a) The Company. The Company shall not, and shall not permit any of its agents, contractors, Subcontractors, or employees to, store, use, release, discharge, or deposit on any portion of the Seneca Site, the Landfill, the Company Site or the existing site of the EGP ("Old Company Site") any Hazardous Materials except in accordance with applicable Law. The Company acknowledges that Condensate may be classified as a Hazardous Material depending on its constituents. The Company shall defend, indemnify and hold harmless SMI and SMI's officials, employees, agents, and contractors from and against any claims, losses, liability, damages, penalties, fines, costs, and expenses based on any failure of the Company or its agents, contractors, Subcontractors or employees to comply with any Law pertaining to the Environment or to adhere to the terms of this Section 8.2 (a). The Company, after consultation with SMI, shall undertake all measures necessary and appropriate to remediate any such failure, provided however, that with respect to the Old Company Site, SMI acknowledges that no remediation will be necessary provided that there are no problems noted in a Phase I environmental review conducted after the Company vacates the Old Company Site. The indemnity of the Company set forth in this Section 8.2 (a) shall survive the termination or expiration of this Contract.

(b) SMI. Except for the Old Company Site, SMI understands and agrees that solely by virtue of entry upon the Seneca Site and the Landfill and the taking of actions authorized by or consistent with this Contract, neither the Company nor any of its agents, contractors, subcontractors, employees, directors, or officers shall have, or shall be deemed to have, in any way participated in the operation of the Landfill or assumed any liability or obligation associated with materials of any type or description (including Hazardous Materials) deposited, stored, or received on or within the Seneca Site by any entity (including SMI) other than the Company. The Company shall at no time have any control over or responsibility for the disposal of any wastes or materials at the Landfill. Except as expressly set forth in Section 8.2 (a) above and for those obligations of the Company to operate and maintain the EGP and/or the Project in compliance with all Laws, SMI acknowledges and agrees that the Company shall have no obligation to comply with any Law pertaining to the Environment with respect to the Landfill, or for the removal or remediation thereof unless directly caused by the acts or omission of the Company. Except as provided herein, under no circumstances shall the Company be responsible for compliance with any Laws pertaining to the Environment or for conducting any investigatory, removal or remediation actions (as those terms are defined in CERCLA) which results from activities not caused by the Company. SMI shall defend, indemnify and hold harmless the

Company and the Company's officials, employees, agents, and contractors from and against any claims, losses, liabilities, damages, penalties, fines, costs, and expenses based on any failure of SMI or its agents, contractors, Subcontractors or employees to comply with any Law pertaining to the Environment or to adhere to the terms of this Section 8.2 (b).

### 8.3 Insurance.

(a) Liability. The Company and SMI covenant and agree to maintain necessary and appropriate commercial general liability insurance in an amount not less than combined single limit, with an excess liability policy of at least which excess coverage insurance may be umbrella coverage, covering injury to property or persons which may arise as a result of their respective activities at the Landfill and the Company Site, and naming the other party to this Contract as an additional insured. Each party shall provide the other party with evidence of such insurance prior to the commencement of Project construction, and the policies shall contain an endorsement to the effect that any cancellation or material change affecting the interest of additional insured party shall not be effective until 30 calendar days after notice to that party or in accordance with New York law, whichever period is longer.

(b) Casualty. The Company shall carry insurance (which during construction of the Project and all Phases may be builder's risk completed value form or other comparable coverage) against all risks of physical damage, including loss by fire, flood, storm, earthquake, vandalism, theft, and such other risks as may be included in the standard all-risk form of coverage from time to time available, in an amount which is not less than the book value of the Project, and which coverage shall be exclusive to the Project, and naming SMI as an additional insured.

(c) Employees. The Company and SMI shall each carry and maintain for its employees workers compensation and employers' liability insurance as is required by New York or federal law. The Company shall require all of Company's contractors performing work at the Project or entering the Seneca Site to obtain and maintain such required insurance.

(d) Automobiles. The Company shall carry automobile insurance for owned, non-owned and hired vehicles. The minimum limit of liability carried on such insurance shall be \$1,000,000 for each accident, combined single limit for bodily injury and property damage.

(e) Deductibles. Any insurance required to be provided by the Company or SMI pursuant to this Contract may contain deductibles of not greater than (i) for commercial general liability insurance (ii) for property damage insurance on machinery, fire and extended coverage; and (iii) property damage insurance on earthquake and flood, and may be provided by blanket, umbrella, or excess coverage insurance covering the Project and other locations. The insured party will be responsible for the payment of all deductibles.

(f) Copies. The Company and SMI shall furnish each other with a duplicate original or agent certified copy of or certificate evidencing any and all current policies maintained to satisfy the provisions of this Section 8.3. The Company and SMI shall provide

each other with copies of certificates of renewal of any insurance required hereunder prior to the expiration of any required policy.

## ARTICLE IX

### TRANSFER AND CONDEMNATION.

9.1 Condemnation of Project. Should title or possession of the whole of the Project be taken by a duly constituted authority in condemnation proceedings or should a partial taking in the reasonable opinion of the Company render the remaining portion of the Project unfit for its intended use, then the Company may at its election terminate this Contract by notice to SMI given within sixty (60) days from the date of such taking; provided, that the Company shall then have the same obligations as provided in Section 3.2 above.

9.2 Awards and Damages. The Company in its own name or in the name of SMI shall be entitled to bring a separate claim against the condemning authority for all damages to which it is entitled under the substantive law of the State of New York. All damages awarded therefore shall belong to the Company except for amounts allocated to the land upon which the Company Site is located. All damages awarded to SMI which are attributable to the operation of the MGP or its presence at the Company Site shall be the property of the Company and shall be paid to the Company within ten (10) days after receipt by SMI.

9.3 No Transfer. SMI covenants not to institute, advocate, or pursue any condemnation of the Project during the Term, except to the extent specifically agreed to by the Company.

## ARTICLE X

### REPRESENTATIONS, WARRANTIES, AND COVENANTS.

10.1 Representations, Warranties, and Covenants of SMI. SMI hereby represents, warrants, and covenants to and with the Company that as of the date of execution of this Contract and thereafter:

(a) Existence. SMI is a corporation duly organized, validly existing, and in good standing under the laws of the State of New York. SMI has the power and lawful authority to enter into and perform its obligations under this Contract and any other documents required by this Contract to be delivered by SMI (collectively the "SMI Documents").

(b) Authorization. The execution, delivery, and performance by SMI of its obligations under this Contract and under the SMI Documents have been duly authorized by all necessary corporate action, do not and will not violate any provision of law, and will not violate any provision of its articles of incorporation, by-laws or any similar document or constitute a material default under any agreement, indenture, or instrument to which it is a party or by which its properties may be bound or affected.

(c) Validity of Documents. The Contract and the SMI Documents when duly executed and delivered, will constitute valid and legally binding obligations of SMI enforceable in accordance with their terms, except as such enforceability may be limited by (i) bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors' rights generally or, (ii) application of general principles of equity including availability of specific performance as a remedy.

(d) Litigation. Except for the application to expand the Landfill, there are no actions, suits, or proceedings pending or, to the best of SMI's knowledge, threatened against SMI or any of SMI's properties before any court or governmental department, commission, board, bureau, agency, or instrumentality that, if determined adversely to SMI, would have a material adverse effect on the transactions contemplated by the SMI Documents

(e) Title. SMI has good and marketable title to, and the right to sell, the LFG to be delivered hereunder free and clear of all liens, encumbrances and claims whatsoever.

10.2 Representations, Warranties, and Covenants of the Company. The Company hereby represents, warrants, and covenants to and with SMI as of the date of execution of this Contract and thereafter:

(a) Existence. The Company is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of New York. The Company has the power and lawful authority as a limited liability company to enter into and perform its obligations under this Contract and any other documents required by this Contract to be delivered by the Company (collectively the "Company Documents").

(b) Authorization. The execution, delivery, and performance by the Company of its obligations under this Contract and under the Company Documents have been duly authorized by all necessary limited liability company action, do not and will not violate any provision of law, and do not and will not violate any provision of its operating agreement or articles of organization or any similar document or result in a material breach of, or constitute a material default under any agreement, indenture, or instrument to which it is a party or by which it or its properties may be bound or affected.

(c) Validity of Documents. The Contract and the Company Documents when duly executed and delivered, will constitute valid and legally binding obligations of the Company enforceable in accordance with their terms, except as such enforceability may be limited by (i) bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors' rights generally or, (ii) application of general principles of equity including availability of specific performance as a remedy.

(d) Litigation. There are no actions, suits, or proceedings pending or to the best of the Company's knowledge or threatened against the Company or any of its properties before any court or governmental department, commission, board, bureau, agency, or

instrumentality that, if determined adversely to it, would have a material adverse effect on the transactions contemplated by the Company Documents.

10.3 Representations and Warranties - General. Each party acknowledges that its representations and warranties as set forth above will be relied upon by the other in entering into and performing under this Contract. The representations and warranties contained in this Article shall survive the termination of this Contract.

## ARTICLE XI

### MISCELLANEOUS PROVISIONS.

11.1 Effective Date. This Contract shall become an effective, binding agreement as of the date first mentioned above.

11.2 Force Majeure. Should the performance of any act required by this Contract to be performed by either SMI or the Company (except for the obligation to make payments) be prevented or delayed by reason of any acts of God, strike, lock-out, labor problems, inability to secure materials, delay in the issuance of licenses, permits or other necessary authorizations for the siting, construction, operation or maintenance of the Project or the Landfill, change in governmental laws or regulations, or any other cause beyond the reasonable control of the party required to perform the act including: (i) the failure of the New York State Electric & Gas Corporation (NYSEG), its successors or affiliates, to interconnect the MGP with the NYSEG distribution system or (ii) the failure of the Landfill to obtain permit expansions or to continue to produce LFG through no fault of SMI, and if such prohibition or delay could not have been avoided by the exercise of reasonable foresight or overcome by the exercise of reasonable diligence. The party claiming force majeure shall notify the other party in writing within ten (10) days of the occurrence of the event and shall use all reasonable efforts to resume performance as soon as possible.

11.3 Assignment and Subgrant. Except as elsewhere provided in this Contract, the Company may not, without first obtaining the prior written consent of SMI, sell, assign, transfer any or all of its rights, title, interests, or obligations in, on, to, and under this Contract and the Project.

11.4 Actions by the Company. Whenever any action is required or permitted to be taken by the Company under the terms of this Contract, such action may be taken and performed by any authorized officer, director, or other representative of the Company or authorized agent of the Company.

11.5 Actions by SMI. Whenever any action is required or permitted to be taken by SMI under the terms of this Contract, such action may be taken and performed by any authorized officer, director, or other representative of SMI or authorized agent of SMI.

11.6 Notices. All notices or other communication required or permitted hereunder shall be deemed given when received and, unless otherwise provided herein, shall be in writing, shall

be sent by nationally recognized overnight courier service or sent by registered or certified mail, return receipt requested, deposited in the United States mail, postage prepaid, addressed to the parties at the addresses set forth below, and shall be deemed received upon the sooner of (i) the date actually received; or (ii) the fifth business day following mailing by registered or certified mail.

To The Company: Seneca Energy II, LLC  
Peter H. Zeliff, President and CEO  
2917 Judge Road  
Oakfield, New York 14125

With a copy to: Horizon Power, Inc.  
Kevin D. Cotter, Managing Director – Assets  
6363 Main Street  
Williamsville, New York 14221

Telephone: (716) 857-7631  
Fax: (716) 857-7445

To SMI: Seneca Meadows, Inc.  
c/o Mr. Donald R. Gentilcore Jr.  
1786 Salcman Road  
Waterloo, New York 13165

With a copy to: Thomas J. Fowler, Esq.  
General Counsel  
IESI Corporation  
2301 Eagle Parkway  
Suite 200  
Fort Worth, TX 76177

Notice of change of address shall be given by written notice in the manner detailed in this Section.

11.7 Successors and Assigns. All the terms and provisions of this Contract shall be binding upon, inure to the benefit of, and be enforceable by the successors and permitted assigns of the parties hereto. This agreement and each of the rights and obligations of the parties hereunder may not be assigned without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

11.8 Construction of Contract.

(a) Governing Law. The terms and provisions of this Contract shall be construed in accordance with the laws of the State of New York without regard to its conflicts of laws provisions.

(b) Jurisdiction and Venue. Any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with this Contract or the transactions contemplated hereby may be brought in any state court in Seneca County, New York or in any federal court located in the State of New York, and each of the parties hereby consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by Law, any objection which it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding which is brought in any such court has been brought in an inconvenient forum. Process in any such suit, action or proceeding may be served on any party anywhere in the world, whether within or without the jurisdiction of any such court.

(c) Interpretation. The parties agree that the terms and provisions of this Contract embody their mutual intent and that such terms and conditions are not to be construed more liberally in favor of, nor more strictly against, either party. To the extent the mutual covenants of the parties under this Contract create obligations that extend beyond the termination or expiration of this Contract, the applicable provisions of this Contract shall be deemed to survive such termination or expiration for the limited purpose of enforcing such covenants and obligations in accordance with the terms of this Contract.

(d) Partial Invalidity. If any term or provision of this Contract, or the application thereof to any person or circumstances, shall, to any extent, be invalid or unenforceable, the remainder of this Contract or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each remaining term and provision of this Contract shall be valid and enforceable to the fullest extent permitted by law.

(e) Waiver of Jury Trial. Each of the parties hereto hereby irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or related to this Contract or the transactions contemplated hereby.

11.9 Counterparts. This Contract may be executed in counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument.

11.10 Entire Contract. The provisions of this Contract and the attached Exhibits constitute the entire understanding and agreement between the parties regarding the construction, operation and maintenance of the Project, supersede entirely all prior understandings, agreements or representations regarding the subject matter hereof, whether written or oral, and may not be altered or amended except by an instrument in writing signed by the parties.

11.11 No Partnership. Nothing contained in this Contract shall be construed to create any association, trust, partnership, or joint venture or impose a trust or partnership, duty, obligation, or liability or an agency relationship on, or with regard to, either party. Neither party

hereto shall have the right to bind or obligate the other in any way or manner unless otherwise provided for herein.

11.12 Waiver. No failure or delay of any party to exercise any power or right under this Contract shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power.

11.13 Confidential Information. Except as required by applicable law, neither party shall, without the prior written consent of the other party, disclose any Confidential Information obtained from the other party to any third parties other than to any lender and prospective lender for the Project, consultants, or to employees who have agreed to keep such information confidential as contemplated by this Contract and who need the information to assist either party with the rights and obligations contemplated herein.

11.14 Third Party Beneficiaries. This Contract is intended to be solely for the benefit of the parties hereto and their permitted successors and permitted assignees and is not intended to and shall not confer any rights or benefits on any other third party not a signatory hereto; except as provided with respect to any lender, which lender(s) shall be deemed capable of enforcing the rights and interests granted lender(s) herein.

11.15 Attorney Fees. The prevailing party in any litigated dispute between the parties arising out of the interpretation, application or enforcement of any provision of this Contract shall be entitled to recover all of its reasonable attorneys' fees.

11.16 Discrimination. During the performance of this Contract, the Company agrees as follows:

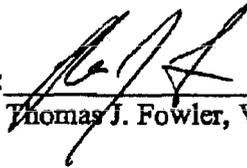
(a) It will not discriminate unlawfully against any employee or applicant for employment because of race, religion, color, sex, or national origin.

(b) The Company, in all solicitations or advertisements for employees placed by or on behalf of the Company, will state that it is an equal opportunity employer.

(c) Notices, advertisements, and solicitations placed in accordance with Federal law, rule, or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

**IN WITNESS WHEREOF**, the parties have executed this Contract as set forth below.

Seneca Meadows, Inc.

By:   
Thomas J. Fowler, Vice President

Seneca Energy II, LLC.

By: 



## LEASE

**THIS AGREEMENT** is made as of August 29, 2006, by and between Seneca Meadows, Inc., a New York corporation with an office at 1786 Salcman Road, Seneca Falls, New York (the "Lessor") and Seneca Energy II, LLC., a New York company with an office at 2917 Judge Road, Oakfield, New York, 14125 (the "Lessee").

### WITNESSETH:

**WHEREAS**, on even date herewith the parties entered into a Gas Sale Agreement (hereinafter referred to as the "Gas Agreement") for the sale of landfill gas from Lessor's landfill to Lessee's electric generation plant; and

**WHEREAS**, the Lessee intends to build an electrical generation facility on property described in Schedule "A" hereinafter referred to as the "Leased Premises"; and

**NOW, THEREFORE**, in consideration of their mutual covenants set forth below and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, the Lessor and Lessee hereby agree as follows:

1. **Definitions.** For purposes of this Agreement, the following terms shall have the respective meaning set forth below:

(a) **Environment.** All air, water, or water vapor, including surface water and ground water, any land, including land surface or subsurface, and includes all fish, wildlife, biota and all other natural resources or as defined in any local, state, federal law, rule, regulation, zoning ordinance, order, permit, approval, or authorization.

(b) **Generation Operations.** All generation, work and other operations related to the generation of electricity at the Leased Premises through landfill gas recovered from the Landfill and all work and operations related to the processing, production, transportation and sale of any such electricity and the installation of buildings, facilities and equipment at the Leased Premises and Landfill (exclusive of the landfill gas located thereon) incident to such purposes;

(c) **Governmental Agencies.** All federal, state, local and municipal agencies, authorities or individual officers or representatives thereof having jurisdiction or legal authority over or with respect to the Landfill, to the generation of electrical power either from landfill gas recovered from the Landfill or generated from alternative fuel sources or to the sale of any such electricity;

(d) **Hazardous Materials.** Any oil or other petroleum products, pollutants, contaminants, toxic or hazardous substances or materials (including, without limitation, asbestos and PCBs), and any hazardous wastes or other materials from time to time regulated under any applicable statutes, regulations, or ordinances governing pollution or the protection of the

environment including, but not limited to, the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976, the Toxic Substances Control Act of 1976, and New York law, all as may be amended from time to time;

(e) Landfill. That certain landfill owned by the Lessor and located in the Town of Seneca Falls, County of Seneca, State of New York, as described in the Gas Agreement;

(f) Laws: Any local, state or federal law, rule, regulation, zoning ordinance, order, permit (including but not limited to all permits held by Lessor for the operation of the Landfill and the Seneca Site and all permits held by the Lessee for the operation of the Generation Operations), approval, or authorization.

2. Basic Lease. The Lessor does hereby lease the Leased Premises to the Lessee for the Generation Operations and all uses incident thereto including the fulfillment of the Lessee's obligation under the Gas Agreement and, in addition thereto, hereby gives to the Lessee a nonexclusive right to:

(a) Enter upon and use the Landfill for the Generation Operations and for all lawful purposes incident to performing its obligations here under and under the Gas Agreement;

(b) Use the surface of the Landfill for all lawful purposes incident to the Generation Operations, with the right of ingress and egress to and from the Landfill at all reasonable times for such purposes, including the right to construct, maintain and use such roads and improvements and such pipelines as may be necessary for the Generation Operations;

(c) Construct and maintain such buildings, facilities and equipment on the Leased Premises and on the Landfill as may be reasonably necessary for the Generation Operations, including installation of all utility lines, pipes, conduits, and the like to service the Leased Premises, provided Lessee uses reasonable care in avoiding any material interference with Lessor's adjacent premises;

(d) Prior to Lessee commencing construction of any buildings or other improvements upon the Leased Premises, Lessee shall (i) obtain any and all municipal permits, consents and/or approvals for the proposed construction, (ii) submit to Lessor for review all final building and site plans. Lessor shall have fifteen (15) days in which to advise the Lessee of its comments with respect to such building and site plan.

(e) Lessee shall not suffer any mechanics or other lien to be filed against the Leased Premises or the Landfill by reason of work, labor services or materials performed at Lessee's request or to anyone holding the Leased Premises and/or the Landfill through or under the Lessee. If any such mechanic's lien shall at any time be filed against the Leased Premises and/or the Landfill, the Lessee shall forthwith cause the same to discharge of record by payment, bond, order of a court of competent jurisdiction or otherwise. If the Lessee shall

fail to cause such lien to be discharged within 30 days after being notified of the filing thereof and before judgment or sale thereunder, then in addition to any other right or remedy of the Lessor, the Lessor may, but shall not be obligated to, discharge the same by paying the amount claimed to be due or by posting a bond in the amount due, and the amount so paid by the Lessor and/or all actual costs and expenses, including reasonable attorney's fees incurred by the Lessor in procuring the discharge of such lien, shall be deemed to be additional rent for the Leased Premises and shall be due and payable by the Lessee to the Lessor on the first day of the next following month. It is acknowledged between Lessor and Lessee that the Lessee's failure to remove or bond any such lien within thirty days after notice of filing thereof, shall in and of itself constitute damage to the Lessor in the amount of said lien and any expenses incurred to remove the same, including reasonable attorney's fees. Any bond issued pursuant to this paragraph shall be issued by a recognized insurance company or surety company authorized to do business in the State of New York. Nothing in this Lease shall be construed as a consent on the part of Lessor to subject the Lessor's estate in the Leased Premises and/or the Landfill to any lien or liability under the mechanics lien law or other law of the State of New York.

(f) Lessee assumes the sole responsibility for the operation and maintenance of the Leased Premises except as otherwise set forth in this Agreement. Lessor shall have no responsibility with respect thereof and shall have no liability for damage to the property of Lessee of any tenant, subtenant, or occupant of the Leased Premises or any portion thereof on any account or for any reason whatsoever, except as caused by the acts or omissions of the Lessor, its agents, employees or invitees. Lessee shall take good care of the Leased Premises at its expense and make as and when needed all necessary repairs to the improvements located thereon. Lessee shall also maintain in a condition suitable for the operation of its business the exterior of any building or improvements constructed by Lessee upon the Leased Premises.

3. Access. The Lessor hereby grants unto the Lessee, its agents and invitees, the exclusive easement described in Schedule "B" attached hereto for purposes of ingress and egress to the Leased Premises and the Landfill.

4. Term. Except as otherwise expressly provided for herein, this Lease shall be for a term coterminous with the term of the Gas Agreement.

5. Protection of Landfill. The Lessee agrees that the terms of this Lease (including, without limitation, Section 2 hereof are subject to the condition that the Lessee shall not engage in any activities that may impair the effectiveness of the cap that presently covers the Landfill or violates any condition of any applicable permit or cause any materials contained therein to leak on to property adjoining the Landfill, or otherwise impair any of Lessor's obligations under any Law or permit. Notwithstanding anything herein to the contrary, the Lessor acknowledges that the Lessee shall have no liability with respect to any condition on the Leased Premises involving the Environment including the removal or remediation thereof unless such condition, and its removal or remediation, results solely from Lessee's activities on the Leased Premises.

6. Insurance. At all times during the term hereof, the Lessee agrees to maintain comprehensive general liability insurance on an all-risk basis with respect to its obligations under this Lease and the Gas Agreement. Lessor shall be named as an additional insured on all of the above described policies. Prior to the commencement of the term of this Lease and thereafter within five (5) days of request from Lessor, Lessee will deliver proof of coverage for the above described policies.

7. Compliance with Laws. The Lessee agrees that, in connection with the Generation Operations on the Landfill and its use of the Leased Premises, the Lessee shall comply with all applicable Laws and good industry practice and (b) obtain all prior approvals, consents and waivers from Governmental Agencies required by all applicable Laws and/or necessary for the Generation Operations. Lessee's only obligation with respect to the Environment will be to remove or remediate any environmental damage caused by it and required by law to be remediated.

8. Rents/Consideration. This Lease is granted by Lessor to Lessee in consideration of the Gas Agreement. With respect to the Leased Premises described in Schedule "A" Lessee shall, pay as additional rent all increases in taxes and assessments over those of the base year of 2006 for local, district and special district improvements that may be assessed against or become a lien upon such Leased Premises or any part thereof by virtue of any present or future law or regulation of a governmental authority and resulting from the improvements which the Lessee constructs on such Leased Premises ("Impositions"). Lessee shall pay all interest and penalties imposed on a late payment of any Impositions caused by Lessee's late payment of the same. If Lessee shall fail to pay for 10 days after written notice and demand by Lessor to Lessee to pay any Impositions on or before the last day upon which the same may be paid without interest or penalty, then Lessor may pay the same with all interest and penalties lawfully imposed upon the late payment thereof, and the amount so paid by Lessor shall thereupon be additional rent due and payable by Lessee to Lessor with the next monthly payment.

Lessee shall also pay all utility charges for water, gas, fuel, oil and electricity consumed on the Leased Premises or otherwise used in connection with the Generation Operations.

Lessee shall pay as additional rent of any and all sums expended by Lessor to cure or fulfill or perform any obligation of Lessee under this Lease including but not limited to reasonable attorneys' fees.

9. Memorandum of Lease. Lessor and Lessee agree that simultaneously with the execution of this Lease, a memorandum of this Lease shall be executed in proper form for recording and, at the option of Lessee, shall be recorded in the Clerk's office of the County in which the Leased Premises are located. Such Lease memorandum shall contain such provisions and information as may be reasonably agreed upon between Lessor and Lessee but shall not contain a rental provision.

10. Maintenance and Repair. Unless otherwise specifically set forth in the Gas Agreement, Lessee shall also be responsible for the repair and maintenance of all equipment, facilities and improvements on the Leased Premises and for the maintenance and repair of the Generation Operations.

11. Warranties and Representations.

(a) Lessor warrants and represents that it has not received any notice that the Leased Premises are currently in violation of any environmental laws, rules, regulations, or orders having application to the Leased Premises. Lessor agrees to indemnify Lessee from any liability, cost, loss, expense or claims brought against Lessee or the Leased Premises by virtue of any misrepresentation with respect to the foregoing warranty and representation.

(b) Lessor warrants and represents that it has good and clear title to the Leased Premises subject only to the liens and encumbrances set forth on the attached Schedule "C". Lessor has full lawful authority to execute this Agreement and the execution of this Agreement has been authorized by the board of directors of Lessor and is not in contravention of the certificate of incorporation, by-laws, rules, or regulations applicable to Lessor.

(c) Lessor warrants and represents to Lessee that the Leased Premises which are the subject of this Agreement are properly zoned for the uses described in this Agreement, including the Generation Operations subject to the issuance of all necessary and/or appropriate permits of Government Agencies.

(d) Lessee warrants and represents to Lessor that Lessee is a duly formed limited liability company, in good standing and authorized to do business in the State of New York and will remain so during the term hereof and that it has been in all respects duly authorized by all necessary limited liability company and/or member action and approval to enter into, perform and guarantee the terms and conditions of this Lease.

(e) Lessor warrants and represents to Lessee that Lessor is a duly formed corporation, in good standing and authorized to do business in the State of New York and will remain so during the term hereof and that it has been in all respects duly authorized by all necessary corporate and/or shareholder action and approval to enter into, perform and guarantee the terms and conditions of this Lease.

(f) Lessee, in its use of the Leased Premises, shall comply with any and all federal, state and local rules, laws, statutes, ordinances and orders regulating the Environment which will affect the use and occupation of the Leased Premises and the Landfill. Lessee shall only be responsible for compliance with environmental Laws that are related to its use and occupation of the Leased Premises and under no circumstances shall the Lessee be responsible for compliance with any environmental Laws or for conducting any investigatory, removal or remediation actions (as those terms are defined in CERCLA), which results from activities not caused by the Lessee. Lessor hereby indemnifies Lessee from any claims, losses or expenses which it may suffer including, but not limited to,

reasonable attorneys' fees as a result of compliance with any environmental law or state law with respect to the Leased Premises which may be required by any entity or party as a result of the acts or omissions of persons or entities other than Lessee, its agents, servants, subcontractors, employees or invitees. Lessee shall, however, not be responsible to abate any nuisance or cure any trespass which may result from the actions or omissions of parties or entities other than Lessee.

12. Lessee's Performance of Lessor's Obligations. In the event the Lessor shall fail to discharge any duties and obligations hereunder imposed upon Lessor, the Lessee shall after giving Lessor written notice of at least thirty (30) days have the right, but not the obligation, to perform such duties or obligations and in such event, the Lessee and its agents shall be entitled to reimbursement from Lessor within thirty (30) days of Lessor's receipt of paid invoices of the total cost and expenses including reasonable attorneys' fees incurred by Lessee with respect thereto. The thirty (30) day notice requirement is hereby waived in circumstances wherein the sooner performance of the Lessor's obligations by Lessee is necessary for the continued efficient operation of the Generation Operations. In such event, Lessee shall give Lessor as much notice as is practical under the circumstances.

13. Lessor's Performance of Lessee's Obligations. In the event the Lessee shall fail to discharge any duties and obligations hereunder imposed upon Lessee, the Lessor shall after giving Lessee written notice of at least thirty (30) days have the right, but not the obligation, to perform such duties or obligations and in such event, the Lessor and its agents shall be entitled to reimbursement from Lessee within thirty (30) days of Lessee's receipt of paid invoices of the total cost and expenses including reasonable attorneys' fees incurred by Lessor with respect thereto.

14. Certifications, Estoppel Certificates. Lessor and Lessee shall execute at the request of the other within 5 days thereof, instruments evidencing the validity of this Lease Agreement, and as often as reasonably requested shall sign estoppel certificates setting forth the date said Lease commenced, the termination date of the Lease, whether or not there is any claim, defense or offset to the enforcement of the Lease, any knowledge that any default or breach by the other party exists, that the Lease is in full force and effect, except as to modifications, agreements or amendments thereto, copies of each of which shall be attached to the Certificate, and such other matters as Lessor or Lessee may reasonably request.

15. Casualty. In the event of the total or partial destruction of the improvements on the Leased Premises by fire or other casualty insured under Lessee's casualty insurance referred to in Section 6 hereof, Lessee shall have the right, but not the obligation, to promptly restore and repair the improvements on the Leased Premises using the proceeds of such insurance. In the event that the improvements on the Leased Premises are so destroyed that they cannot be repaired or rebuilt within one hundred eighty (180) days after the date of the damage or destruction, then and in that event, Lessee may, upon sixty (60) days' prior written notice to Lessor, terminate and cancel this Lease and all obligations hereunder shall thereupon cease and terminate. Any proceeds not utilized by Lessee in restoring or repairing the Leased Premises shall be and remain the sole property of the Lessee. In the event that the

Lessee cancels this Lease pursuant to its rights hereunder, the Gas Agreement shall simultaneously terminate.

16. Eminent Domain. In the event all or any part of the Leased Premises shall be acquired by the exercise of eminent domain by any public or any quasi-public body in such manner that the Leased Premises shall become unusable by the Lessee for the purposes for which it is then using the Leased Premises, then and in that event, this Lease will terminate after possession of the Leased Premises or part thereof is so taken. If Lessor is unable to provide a reasonable alternative site in all respects satisfactory to the Lessee, the Lessor shall have no claim against the Lessee or other person, firm, corporation or governmental authority on account of any such acquisition for the value of the unexpired Lease remaining after possession of the Leased Premises or part thereof is so taken. All damages awarded therefore shall belong to the Lessee except for amounts allocated to the land upon which the Lessee's facilities are located and any amounts allocated to Lessor's income, profit and production tax credits.

17. Party's Non-Liability. The Lessee shall not be liable for damage to any person or property due to any condition of the Leased Premises caused by the Lessor or by reason of the occurrence any accident in or about the Leased Premises due to any act or neglect of the Lessor or its agents, employees, and licensees. The Lessor shall be responsible and liable to the Lessee for any damage ed by it or any other person acting by, through, or under it and for any act done thereon by the Lessor or any other person acting by, through or on behalf of the Lessor.

The Lessor shall not be liable for damage to any person or property due to any condition of the Leased Premises caused by the Lessee or by reason of the occurrence of any accident in or about the Leased Premises due to any act or neglect of the Lessee or its agents, employees, and licenses. The Lessee shall be responsible and liable for any damage to the Leased Premises and for any act done thereon by the Lessee or any other person acting by, through, or under Lessee.

18. Covenant of Quiet Enjoyment. Lessor agrees that if the Lessee shall perform all of the covenants and agreements herein provided to be performed on Lessee's part, the Lessee shall at all times during the term of this Lease have the peaceable and quiet enjoyment and possession of the Leased Premises without any manner of hindrance from the Lessor or any persons lawfully claiming under the Lessor.

19. Notices. Any notice required or permitted to be given or served by either party to this Lease shall be deemed to be given or served when made in writing, by certified or registered mail, return receipt requested, or by Federal Express or other similar overnight delivery service on a national basis with charges prepaid, which notice shall be deemed to be given three (3) days after delivery to the U.S. Postal Service or one (1) day after delivery to Federal Express or other similar overnight carrier addressed as provided in the Gas Agreement.

20. Possession. Lessor agrees that Lessee shall have possession of the Leased Premises and access thereto immediately upon the effective date of the Gas Agreement.

21. Brokers. Lessor and Lessee warrant that they have had no dealings with any real estate broker or agent in connection with the negotiation of this Agreement and that they know of no broker or agent who is or might be entitled to a commission in connection with this Agreement. Lessor and Lessee hereby indemnify each other and hold each other harmless from and against any and all claims for any such commissions or fees claimed by any real estate broker or agent claiming by, through or under said party.

22. Contingencies. The obligations of the Lessee hereunder with respect to the Leased Premises are subject to the construction and operation of a 17.6 Mw electric generation plant on or before December 31, 2007. In the event the plant is not constructed and operating on or before said date, this Agreement shall be null and void and of no further force and effect.

23. Lease Binding on Successors. All provisions of this Lease shall inure to the benefit of the parties hereto and their respective successors and legal representatives. This Lease and each of the rights and obligations of the parties hereunder may not be assigned without the prior written consent of the other party, which consent may not be unreasonably withheld or delayed.

24. Default. It is hereby mutually agreed that: (a) If Lessee shall fail to keep and perform each and every material covenant, condition and agreement contained in the Lease and on the part of Lessee to be kept and performed, including payment of any rent and additional rent due hereunder; or (b) if Lessee shall abandon the Leased Premises or the Generation Operations; or (c) an execution or attachment shall be issued against Lessee whereupon the Leased Premises or the Generation Operations shall be taken or occupied by someone other than Lessor; or (d) if Lessee shall petition to be declared bankrupt or insolvent according to law; or (e) if a receiver or other similar officer shall be appointed to take charge of any part of the property or to wind up the affairs of Lessee, and it is not discharged within sixty (60) days; or (f) if any assignment shall be made of Lessee's property for the benefit of creditors; or (g) if a petition shall be filed for Lessee's reorganization under Chapter 7 or 11 of the Bankruptcy Code; or (h) an Event of Default, as defined in the Gas Agreement by Lessee occurs, then in each and every such case, Lessee shall be in default under the terms of this Lease. If Lessee shall be in default as said term is defined herein, and such default shall continue for a period of thirty (30) days after written notice thereof to Lessee from Lessor, then Lessor at its sole option may terminate this Lease, provided that if Lessee proceeds with due diligence during such thirty (30) day period to cure such default is unable by reason of the nature of the work involved to cure the same, within said thirty (30) days, its time to do so shall be extended for an additional thirty (30) day period, or such longer period during which such work could reasonably be accomplished with due diligence and continuity, provided however, that the time to cure shall not exceed the time permitted in the Gas Agreement for the cure of an Event of Default. It is understood and agreed that if Lessee fails to cure an Event of Default in the Gas Agreement, Lessor, in addition to any other rights, may terminate this Lease. On default of Lessee, Lessor shall be entitled to the possession (of the Leased Premises and to remove any and all persons and property

therefrom and to re-enter the Leased Premises without further demand of rent or demand of possession, either with or without process of law and without becoming liable to prosecution therefore, and a notice to quit or of intention to re-enter being hereby expressly waived by Lessee, and in the event of any such re-entry or retaking by Lessor, Lessee shall nevertheless remain in all events liable and answerable for the full rental until the date of retaking or re-entry. Lessee expressly agrees to reimburse Lessor for any expenses, including reasonable attorney's fees, Lessor may incur in enforcing the Lessor's rights against Lessee under this Lease, including but not limited to, the collection of rent and securing of possession of the Leased Premises and/or the Landfill.

If Lessee shall breach any of the covenants or provisions of this Lease, Lessor shall have the right of injunction and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not herein provided for. Any mention in this Lease of any particular remedy shall not preclude Lessor from any other remedy it may have in law or in equity. It is expressly covenanted that, the various rights and remedies given to Lessor in this Lease, including the right to remove Lessee by summary proceeding are distinct, separate, nonexclusive and cumulative remedies. Lessee hereby expressly waives any and all right of redemption granted by or under any present or future law if Lessee is evicted or dispossessed for any cause, or if Lessor obtains possession of the Leased Premises by reason of the violation of Lessee of any of the covenants and conditions of this Lease or otherwise. The words "re-entry" and "reenter" as used in this Lease are not restricted to their technical legal meaning.

Whenever in this Lease any sum, item or charge shall be designated or considered as additional rent, Lessor shall have the same rights and remedies for the non-payment thereof as Lessor would have for the non-payment of the rent reserved herein and provided for to be paid by Lessee.

**25. No Waiver.** No waiver of any default of Lessee hereunder shall be implied from omission by Lessor to take any action on account of such default. One or more waivers of any covenant or condition by Lessor shall not be construed as a waiver of a subsequent breach of the same or any other covenant or condition, and the consent or approval by Lessor to or of any act by Lessee requiring Lessor's consent or approval shall not be construed to waive or render unnecessary Lessor's consent to or approval of any subsequent similar act by Lessee. The receipt by Lessor of rent with knowledge of the breach of any covenant of this Lease shall not be deemed a waiver of such breach. No provision of this Lease shall be deemed to have been waived by Lessor unless such waiver by in writing signed by Lessor. No payment by Lessee or receipt by lessor of a lesser amount than the monthly rent or the additional rent herein provided for shall be deemed to be other than on account of the earliest stipulated rent or additional rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance of such rent or additional rent or pursue any other remedy Lessor may have pursuant to this Lease, at law or equity.

26. Termination. Upon expiration or termination of this Lease, all equipment used to generate electricity on the Leased Premises including, but not limited to, the electrical generators and all other personal property and leasehold improvements (except the Generating Facility as that term is defined in the Gas Agreement) used in connection with the Generation Operations shall remain the property of Lessee. Lessee shall remove such equipment, personality or leasehold improvements within six (6) months after the termination of this Lease. In the event Lessee shall fail to remove same within six (6) months of the termination of this Lease, then such equipment, personality and leasehold improvements shall be deemed abandoned. Subsequent to the expiration of the aforementioned six (6) month period, the Generating Facility shall remain and become the property of Lessor.

27. General. This Agreement shall be governed by and construed in accordance with the laws of the State of New York. This Agreement contains the entire agreement and understanding of the parties hereto with reference to the subject matter hereof and supersedes all prior negotiations, discussions, commitments and understandings, whether written or oral. This Agreement may be modified, waived or discharged only by an instrument in writing signed by the party against which enforcement of such modification, waiver or discharge is sought.

28. Holdover by Lessee. Except for Lessee's rights under Article 27, if Lessee shall not immediately surrender possession of the Leased Premises upon any termination of this Lease, Lessee, at the option of the Lessor, shall thereafter become a tenant from month-to-month at a monthly rental equal to the sum of (i) the monthly rent, and (ii) the average monthly amount of all other items of rent payable hereunder during the then most recent year, subject to all other, conditions, provisions and obligation of this Lease insofar as the same are applicable to a month-to-month tenancy and Lessee shall indemnify Lessor against Loss or liability resulting from Lessee's delay in so surrendering the Leased Premises and/or the Landfill.

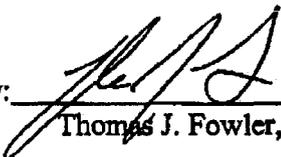
29. Cross-Default. A default under the Gas Agreement shall constitute a default hereunder.

30. Force Majeure. In the event either Lessor or Lessee shall be delayed or hindered in or prevented from the performance of any act required under this Lease by reason of fire, casualty, strikes, lockouts, labor trouble, inability to procure materials, permits or supplies, failure of power, governmental authority, riots, insurrection, war or other reason of like nature, where such delay, hindrance or prevention of performance shall not be within the reasonable control of the Lessor or the Lessee, and shall not be avoidable by diligence, then, the Lessor or the Lessee shall thereupon be excused for such period of delay.

31. Lessor's Access. Lessor shall have access to the Leased Premises at all times during the term hereof provided that such access shall not interfere with the Lessee's use and enjoyment of the Leased Premises. Lessor's access shall be limited to those matters which relate to its operation of the Landfill.

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by its duly authorized representative as of the date first above written.

**SENECA MEADOWS, INC.**

By:   
Thomas J. Fowler, Vice President

**SENECA ENERGY II, LLC**

By: 

Schedule "A"

**EASEMENT DESCRIPTION (Parcel No. 1)**

Property of

**SENECA MEADOWS, INC.  
New York State Route No. 414  
Town of Seneca Falls  
County of Seneca  
State of New York**

**Deed Reference: Liber 674, Page 227**

**BEGINNING** at a point on the south side of a 60 foot right of way at the northwest corner of said easement to be conveyed, said point being **N 87°09'43" E** along the south line of said right of way a distance of 760.37 feet from a point in the centerline of New York State Route No. 414, said point being northerly along the centerline of New York State Route No. 414 a distance of 1676 feet more or less from the intersection of the centerline of New York State Route No. 414 with the centerline of Salcman Road.

**THENCE** running **N 87°09'43" E** along the south line of said right of way and the north line of herein easement a distance of 451.61 feet to a point.

**THENCE** running on a curve to the right for an ARC distance of 31.42 feet to a point, said course being on a Chord of **S 47°50'17" E** a distance of 28.28 feet.

**THENCE** running **S 02°50'17" E** along the west line of said right of way and along the east line of herein easement a distance of 657.27 feet to a point, said point being the southeast corner of herein easement.

**THENCE** running **S 87°09'43" W** along the south line of herein easement a distance of 471.61 feet to a point, said point being the southwest corner of herein easement.

**THENCE** running **N 02°50'17" W** along the west line of herein easement a distance of 677.27 feet to the point of **BEGINNING** and containing 7.331 acres of land more or less.

Schedule "B"

RIGHT OF WAY DESCRIPTION

Property of

SENECA MEADOWS, INC.  
New York State Route No. 414  
Town of Seneca Falls  
County of Seneca  
State of New York

Deed Reference: Liber 674, Page 227

BEGINNING at a point on the apparent east highway boundary of New York State Route No. 414 at the southwest corner of right of way to be conveyed, said point being N 87°09'43" E a distance of 40.8 feet from a point in the centerline of New York State Route No. 414, said point being northerly along the centerline of New York State Route No. 414 a distance of 1676 feet more or less from the intersection of the centerline of New York State Route No. 414 with the centerline of Saleman Road.

THENCE running N 87°09'43" E along the south line of said right of way a distance of 1171.18 feet to a point, said point being an angle in said right of way.

THENCE running on a curve to the right for an ARC distance of 31.42 feet to a point, said course being on a chord of S 47°50'17" E a distance of 28.28 feet.

THENCE running S 02°50'17" E along the west line of said right of way a distance of 160.00 feet to a point, said point being a southwest corner of said right of way.

THENCE running N 87°09'43" E along the south line of said right of way a distance of 60.00 feet to a point, said point being a southeast corner of said right of way.

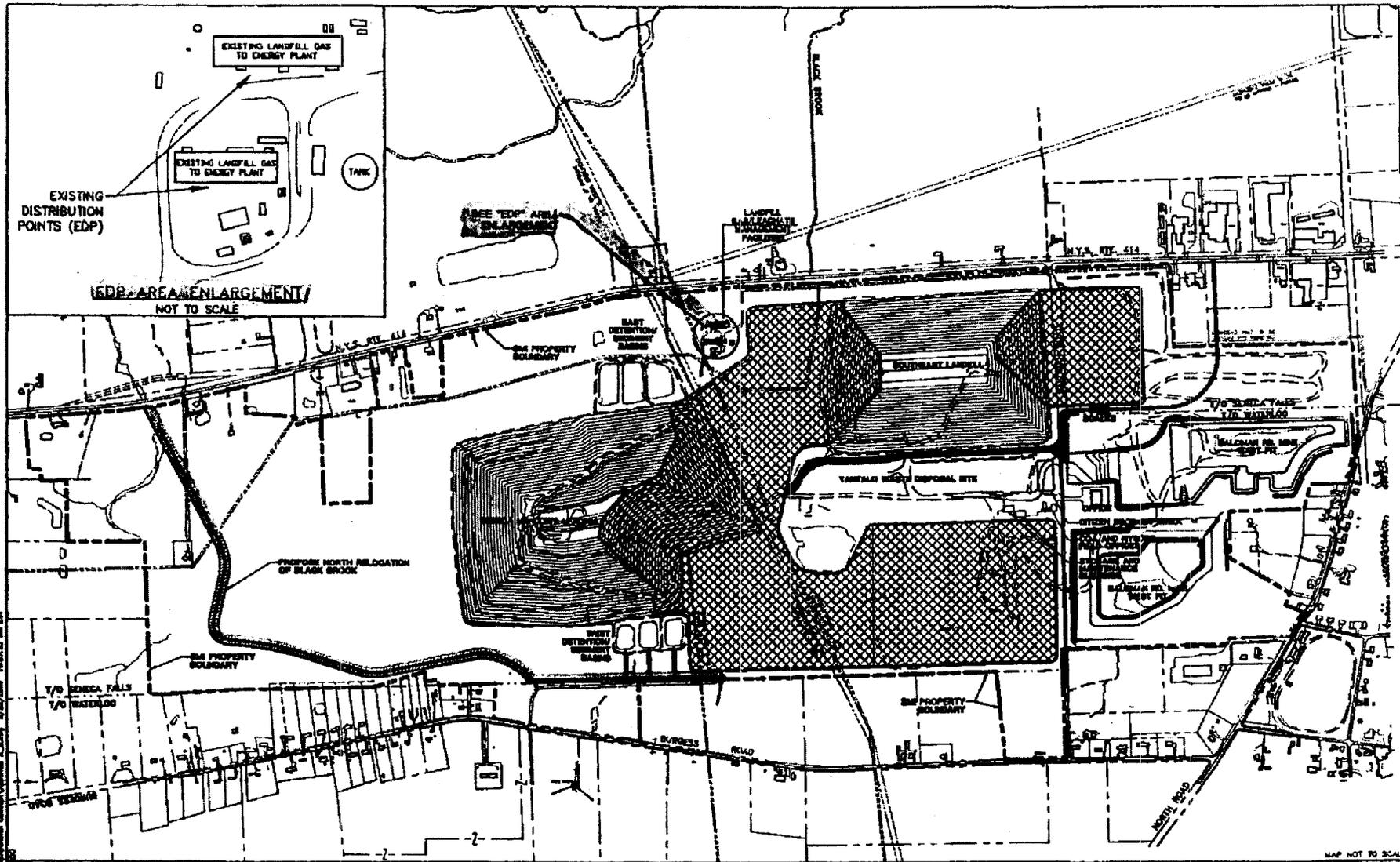
THENCE running N 02°50'17" W along the east line of said right of way a distance of 240.00 feet to a point, said point being the northeast corner of said right of way.

THENCE running S 87°09'43" W along the north line of said right of way a distance of 1251.79 feet to a point on the apparent east highway boundary of New York State Route No. 414.

THENCE running S 03°25'39" E along the apparent east highway boundary of New York State Route No. 414 a distance of 60.00 feet to the point of BEGINNING and containing 1.974 acres of land more or less.

**Schedule "C"**  
**Liens and Encumbrances**

**NONE**

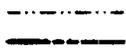


CHAPTER 3 - SUR

**MAP LEGEND:**



INDICATES LANDFILL EXPANSION AREA



INDICATES TOWN BOUNDARY LINE

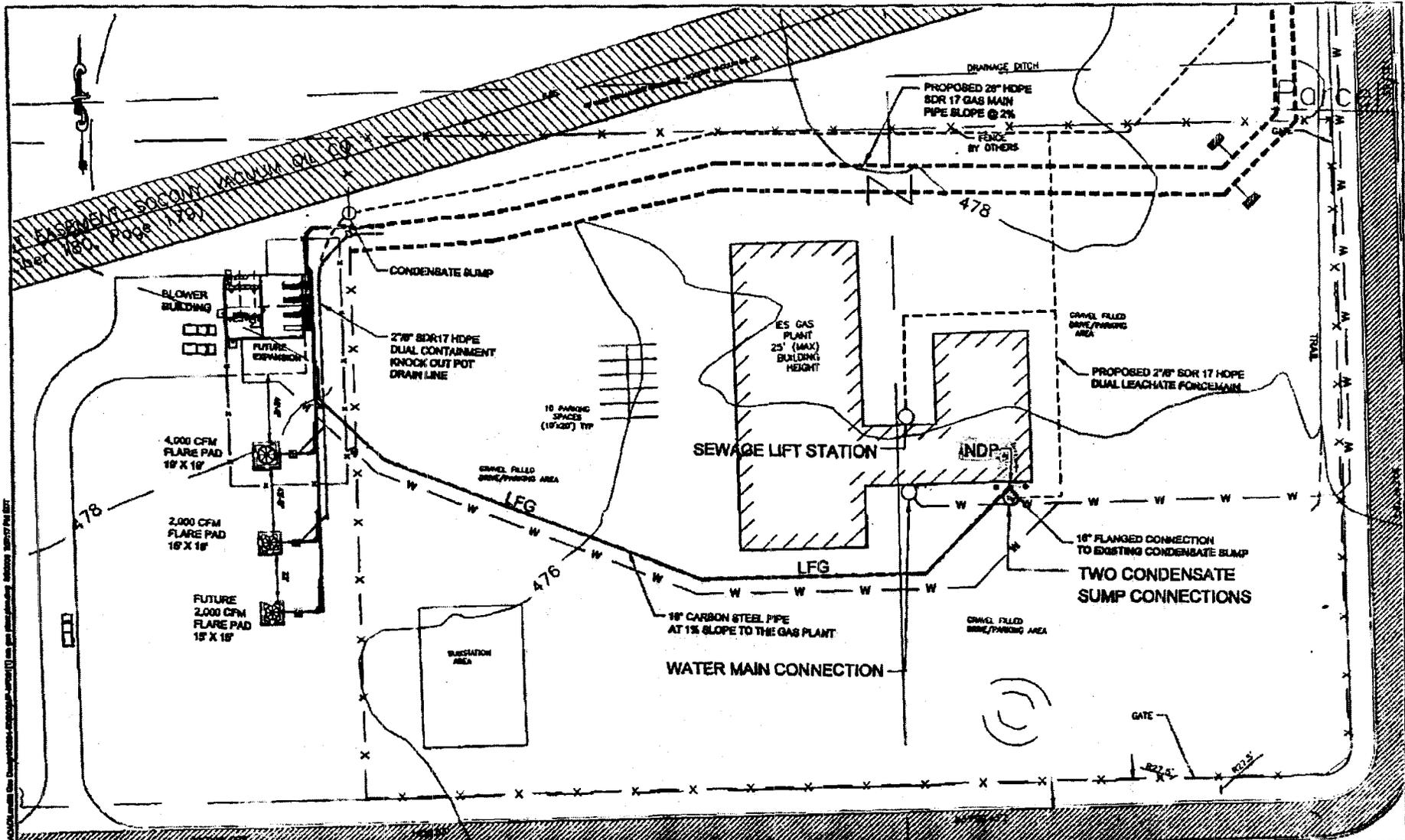


INDICATES SENeca MEADOWS PROPERTY BOUNDARY



**Seneca Meadows, Inc.**  
**Seneca Meadows Landfill**

**EXHIBIT A**  
**LANDFILL BOUNDARY**  
**LANDFILL GAS AGREEMENT**



DATE: 11-1-10



Seneca Meadows Incorporated

DESIGNED BY	
DRAWN BY	
CHECKED BY	

SCALE: 1" = 40'

PROJECT: RENEWABLE RESOURCE PARK  
 SENeca FALLS SENeca COUNTY NEW YORK

PROPOSED GAS COLLECTION SYSTEM

P-1 SH-1

"ΣΧΗΜΑΤΑ"

**Seneca Energy II, LLC  
Landfill Gas to Energy Facility - Expansion / Relocation  
Construction Work Breakdown Structure  
Cost Detail**

PHASE	TASK	DESCRIPTION OF WORK	BUDGET COST	Allocated to the Relocation
1000	1000	<b>GENERAL CONDITIONS</b>		
	1010	Water Supply (City/Well) - Municipal Fees		
	1020	Sewer/septic - Municipal Fees		
	1030	Interconnect Costs		
	1040	Permit Fee's		
	1050	Interest on Advances from Bank (July - October)		
	1060	Attorney Fees		
	1070	Engineering / Design		
	1080	Construction Project Manager (AGI)		
	1090	Construction Management Fee / Startup		
	1100	Relocation of Existing Plants I & II (phase II and III)		
2000	2000	<b>SITE PREPARATION</b>		
	2010	Site Grading		
	2020	Building Excavation		
	2030	Crushed Stone Driveway/Rip-Rap/Final Grading		
2500	2500	<b>PLUMBING</b>		
	2510	Plumbing Contractor		
	2520	Owner Supplied Plumbing / Drain (BM-600)		
	2530	Owner Supplied Misc. Plumbing (BM-502)		
3000	3000	<b>CONCRETE</b>		
	3010	Concrete Contractor		
4000	4000	<b>MASONRY</b>		
	4010	Masonry Contractor		
	4020	Roof Joist Installation		
5000	5000	<b>STEEL</b>		
	5010	Misc. Steel (BM-504)		
	5020	Misc Steel Installation Cost (see Mechanical)		
	5030	Fabricated Items (not included GSS System) - mist & blow down on BM200		
	5040	Overhead Crane (included in misc. steel pkg.)		

<b>6000</b>	<b>6000</b>	<b>CARPENTRY</b>
	6010	Rough Carpentry Labor
	6020	Cabinets & Counter Top Labor (materials under Misc. 14010)
	6030	Drywall/Ceilings/Wall Framing - materials / labor
<b>7000</b>	<b>7000</b>	<b>ROOFING</b>
	7010	Roofing Contractor
	7020	Owner Roofing Labor
	7030	Owner Supplied Roofing Materials (BM-400)
<b>8000</b>	<b>8000</b>	<b>DOOR</b>
	8010	Door Contractor (Hardware - mandors/overheads/frames)
	8020	Door Contractor Installation
	8030	Glass (observation room) - Materials & Labor
<b>9000</b>	<b>9000</b>	<b>FINISHING</b>
	9010	Paint Contractor
	9020	Fencing Contractor
<b>10000</b>	<b>10000</b>	<b>ASTs</b>
	10010	All ASTs Captured in Owner Supplied Mechanical 15020.
<b>11000</b>	<b>11000</b>	<b>RIGGING</b>
	11010	Rigging Contractor
<b>12000</b>	<b>12000</b>	<b>GAS SCRUBBING SYSTEM</b>
	12010	GSS Fabrication Cost
	12020	Owner Supplied GSS Equipment to Field (BM-300)
	12030	Owner Supplied GSS Equipment to Fabricator (BM-301)
<b>13000</b>	<b>13000</b>	<b>INSULATION</b>
	13010	Insulation Contractor
<b>14000</b>	<b>14000</b>	<b>MISC.</b>
	14010	Owner Supplied (BM-501)
	14020	Misc. Instrumentation - Dell Computer (BM-503)
<b>15000</b>	<b>15000</b>	<b>MECHANICAL</b>
	15010	Mechanical Contractor
	15020	Owner Supplied Mechanical (BM-200)
<b>15500</b>	<b>15500</b>	<b>CAT PACKAGE</b>
	15510	BM-1000 (4 engine generator sets 6.4 mW nameplate)
<b>16000</b>	<b>16000</b>	<b>ELECTRICAL</b>
	16010	Electrical Contractor
	16020	Owner Supplied Electrical (BM-100)
	16030	Owner Supplied Substation (BM-700)
	16040	Misc. Electrical (NYSEG meter/RTD) (BM-505)
	16050	Relay testing

	16060	Technical Review NYSEG	
17000	17000	Consumables	
	17010	Ethelene Glycol (Antifreeze)	
	17020	Triethelene Glycol(Reconskid)	
	17030	Lube Oil (one tank full)	

**PROJECT TOTALS**

**Amount of relocation costs to be paid by Seneca Meadows Landfill**

**Seneca Energy II LLC amount to finance** \_\_\_\_\_



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

**MAR 02 2010**

Peter H. Zeliff  
Innovative Energy Systems Inc.  
2999 Judge Road  
Oakfield, NY 14125-9771

Re: Prevention of Significant Deterioration and Ozone Nonattainment Area - New Source  
Review Air Permit Application for Seneca Energy LFGTE Facility at Seneca Meadows  
SWMF Landfill, Seneca Falls, Seneca County, New York, DEC ID: 8453200075

Dear Mr. Zeliff:

The Region 2 Office of the U.S. Environmental Protection Agency (EPA) has reviewed the April 13, 2009 Prevention of Significant Deterioration (PSD) and Ozone Nonattainment Area New Source Review (NAANSR) air permit application for the proposed major modification at an existing major stationary source. The proposed project consists of an electricity generation capacity expansion project from 17.92 megawatts (MW) to 24.32 MW, which will include the addition of four (4) identical Caterpillar (CAT) G3520C internal combustion (IC) landfill gas (LFG) engines. Also, the applicant proposes to increase the carbon monoxide (CO) emissions rates and the landfill gas consumption rates for the fourteen (14) CAT G3516 and four (4) CAT G3520C identical existing LFG engines. This letter is to inform you that your application is incomplete and EPA needs additional information in order to conduct our applicability review.

### Single "Stationary Source" under PSD regulations

According to EPA's definition of a stationary source, "a building, structure, facility, or installation means all the pollutant -emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)."<sup>1</sup>

Since, Seneca Energy LFGTE Facility (Seneca Energy) is located on Seneca Meadows SWMF Landfill (Seneca Meadows) property; the two facilities are located on "adjacent or continuous properties." In addition, they belong to the same industrial grouping. Nevertheless, EPA presumes one facility located within another facility establishes a "control" relationship. As stated by Seneca Energy, their engines will be fueled exclusively with methane-rich gas generated by the Seneca Meadows and "natural gas is not, and will not be, used to fuel the internal combustion engines operations". Thus, EPA presumes that the owner of the Seneca Meadows has control over the electricity generation operations of the Seneca Energy.

<sup>1</sup> 40 CFR 52.21(b) (5) and (6); New Source Review, Workshop Manual, Draft October 1990, page 4

We have not seen any information in your application that overcomes the presumption that Seneca Energy and Seneca Meadows are under common control. Consequently, EPA considers that the two facilities are to be treated as a single source for Clean Air Act permitting purposes.<sup>2</sup>

Therefore, please submit a revised application that would include all pollutant –emitting activities at Seneca Meadows and Seneca Energy.

### **Potential to emit**

Please update your application to include the following information:

- Seneca Energy potential to emit of all criteria pollutants (all emitting sources combined) before this project as of its current title V permit. Also, please provide a list with all emitting sources, including “exempt” or “trivial” sources. Please indicate the permitted date, commencement of operation date, and the potential to emit for each emitting source.
- Seneca Meadows potential to emit of all criteria pollutants (all emitting sources combined) as of its current title V permit. Also, please provide a list with all emitting sources, including “exempt” or “trivial” sources. Please indicate the permitted date, commencement of operation date, and the potential to emit for each emitting source. Additionally please provide the maximum landfill gas generation rate estimated to occur during the life of the landfill.

Please provide all the calculations and assumptions that support the potential to emit. Also, please include: (1) an electronic version of the LandGEM used to predict the landfill gas generation rate; and (2) the description and the basis of the LandGEM model inputs (i.e., waste acceptance rates, methane generation rate, potential methane generation rate, non-methane organic compounds concentration, methane content, landfill waste design capacity and landfill open and closure year).

### **Seneca Energy “Major Stationary Source”**

We note that the proposed project has been treated as a major modification to an existing major stationary source relative to PSD. However, based on your application it is unclear when the facility has become a major source.

Please provide the following information:

- Title V permit number and effective date that first acknowledged Seneca Energy as a major stationary source under the PSD and NAANSR regulations;
- Detailed description of previous modifications subject to PSD review;

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<sup>2</sup> PSD, Nonattainment NSR, and title V programs

### **Request to increase the CO hourly emissions limits for the permitted LFG engines**

Seneca Energy requests to increase the CO hourly emissions limits for the existing LFG engines as follows: (1) A limit of 2.6 grams per horse power hour (g/BHP-hr) for the fourteen (14) CAT G3516( operational since 2004); and (2) A limit of 3.3 g/BHP-hr for the four (4) CAT G3520C (operational since 2007). As a result, the CO tons per year (tpy) will increase from the permitted level of 522.9 tpy to 688 tpy. It is worth noting that Seneca Energy's title V permit contains no CO hourly emissions limits for these engines.

EPA's analysis of these engines' actual CO hourly emissions obtained during the May 18, 2007 and respectively November 9, 2009 stack tests reveals that CO actual emissions(i.e., per each run and the average)are way below Seneca Energy's requested limits. In addition, the CAT G3516 engines' actual CO emissions limit calculated based on the highest mean (that was recorded during the May 18, 2007 stack test), and 99.7% standard deviation, is 2.28 g/BHP-hr; the CAT G3520C engines' CO actual emissions calculated based on the highest mean (that was recorded during the November 9, 2009 stack test), and 99.7% standard deviation, is 2.30 g/BHP-hr. Therefore, in order for EPA to make a decision on the applicant's request to increase the CO hourly emissions, Seneca Energy must substantiate their application by providing supporting documentation on the need to increase the CO emissions limits.

### **Project's Emissions Increases and Net Emissions Increases**

Please update your application to address the following:

- Actual emissions increases(i.e., all criteria pollutants) from the existing and modified CAT G3516 and CAT G3520C LFG engines attributable to the increase of their LFG consumption rates;
- Actual emissions increases and decreases, that occurred at both Seneca Energy and Seneca Meadows, during the contemporaneous period. These emissions changes should also include the actual emissions changes associated with "exempt" and or "trivial" emitting sources;
- Project's net emissions increases and comparison with the PSD significant threshold(i.e., in a table format);

### **Sulfur dioxide (SO<sub>2</sub>) emissions**

#### Project's Potential to emit of SO<sub>2</sub>

Seneca Energy proposed SO<sub>2</sub> emissions from the four (4) new CAT G3520C LFG engines are at 39.7 tpy, whereas the significant applicable PSD threshold is 40 tpy. However, after including the: (1) SO<sub>2</sub> actual emissions associated with the increases of the LFG consumption rates of the existing and modified LFG engines; and (2) actual emissions changes in the contemporaneous period, it is more likely that the proposed net emissions increases, and the significant net emissions increases will exceed the significant SO<sub>2</sub> PSD threshold.

Therefore, please update your application to address SO<sub>2</sub> BACT analysis.

#### Sulfur content in landfill gas

Since the sulfur content in landfill gas can vary considerably over time, EPA has determined that the result of analyses of a single set of the sulfur-bearing compounds in the landfill gas is neither relevant nor satisfactory to guarantee that the proposed project sulfur dioxide annual emission limit will not be exceeded.

Therefore, please perform additional landfill gas sampling and supplement the data already available to better characterize the actual sulfur content of the Seneca Meadows Landfill's landfill gas.

#### **New Source Performance Standard for Municipal Solid Waste Landfill, Subpart WWW**

Please amend your application to include a compliance demonstration with the applicable provisions of Subpart WWW.

#### **Condensable Particulate Matter (CPM)**

Please update your application to include the following:

- Explanation whether the CPM were considered in the PSD applicability determination (i.e., emissions from the proposed project, contemporaneous emissions changes);
- In the event CPM were not included, it is EPA's position that Seneca Energy should include CPM in their PSD applicability determination. Correspondingly, please provide all the calculations, assumptions, reference materials used to arrive to the proposed CPM emissions;

#### **Best Available Control Technology (BACT)**

##### BACT Emission Limit for CO

Seneca Energy established a CO BACT limit of 3.3 g/BHP- hr for the new and existing CAT G3520C LFG engines. This limit is above the maximum limit specified by US EPA RBLC (RBLC) of 3.0 g/BHP- hr for engines without the use of add on controls (NSCR or CO)<sup>3</sup> or siloxanes removal technologies. In addition, the CO BACT limit is above the new engines' manufacturer's guarantees limit of 2.5 g/BHP-hr; this limit has been established for similar LFG engines at Greenville Gas Producers, SC in conjunction with the use of a siloxanes removal technology.

Furthermore, for the CAT G3516 engines, the applicant established a CO BACT limit of 2.6 g/BHP- hr. This limit is at midpoint between the maximum and minimum limits specified by RBLC for engines without the use of add on controls (NSCR or CO)<sup>3</sup> or siloxanes removal technologies.

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<sup>3</sup> SCR: Selective Catalytic Reduction, NSCR: Non Selective Catalytic Reduction, and CO: Catalytic Oxidation

#### BACT Emission Limit for NO<sub>x</sub>

Seneca Energy established a NO<sub>x</sub> BACT limit of 0.6 g/BHP- hr for the new CAT G3520C engines. This limitation is within the range specified by RBLC of 0.50 to 2.0 g/BHP- hr for engines without the use of add on controls (SCR, NSCR)<sup>3</sup> or siloxanes removal technologies. NO<sub>x</sub> BACT limit is above the manufacturer's guarantee value of 0.5 g/BHP-hr; this limit has been established for similar LFG engines at Greenville Gas Producers, SC in conjunction with the use of a siloxanes removal technology.

Since, NO<sub>x</sub> is precursor to ozone and the project's potential to emit exceeds the NYCRR Subpart 231- Nonattainment significant threshold, the control technology for NO<sub>x</sub> must also meet the more stringent requirements for Lowest Achievable Emission Rate (LAER). As a result, the applicant has proposed LAER for their NO<sub>x</sub> emissions and not BACT. NO<sub>x</sub> LAER and other project's requirements relative to the NAANSR are reviewed by NYSDEC under applicable state programs. However, since NO<sub>x</sub> BACT for the proposed project must equate NO<sub>x</sub> LAER, for the purposes of this applicability review EPA would refer to NO<sub>x</sub> BACT.

#### BACT Emission Limit for PM<sub>2.5</sub> and PM<sub>10</sub>

Seneca Energy established a PM<sub>2.5</sub> and PM<sub>10</sub> BACT limit of 0.24 g/BHP- hr for the new CAT G3520C engines. This limitation is within the range specified by RBLC of 0.05 to 0.34 g/BHP- hr (for engines without siloxanes removal technologies). The applicant has established this limit based on the highest actual stack data (plus a 20 % uncertainty factor) from a larger LFG engine CAT Model 3616 operated at an unidentified facility. Note that the 0.24 g/BHP-hr BACT limit is above the AP 42 emissions factors value for particulate matter from LFG engines.

#### EPA's Comments on the proposed BACT emissions limits

In spite of their extensive list of RBLC facilities with lower CO, NO<sub>x</sub>, PM<sub>2.5</sub>, and PM<sub>10</sub> emission limits than their BACT limits, Seneca Energy rejects lower NO<sub>x</sub> and CO limits on the theory the siloxanes in landfill gas damages the engines and makes technical infeasible the utilization of add on controls. Additionally, the applicant claims that their proposed NO<sub>x</sub>, PM<sub>2.5</sub> and PM<sub>10</sub> limits fall among RBLC's determinations range.

Based upon information collected by EPA, siloxanes removal technologies are commercially available and are employed by similar facilities (i.e., Greenville Gas Producers, SC; Keller Canyon, CA; Half Moon Bay, CA; Rhode Island Central Genco, RI; Calabasas Landfill, CA). In addition, Half Moon Bay, CA has installed add on controls consisting of catalytic oxidation and selective catalytic reduction systems for their LFG engines. These systems are still experimental; however actual stack test data indicated compliance with the 0.15 g/BHP-hr NO<sub>x</sub> and 0.52 g/BHP-hr CO BACT limits. Seneca Energy's findings reveal that LFG engines similar with their engines without the use of siloxanes removal technologies or add on controls were permitted at lower BACT emissions level. Additionally, based on EPA review, there are examples of permitted minor sources with lower NO<sub>x</sub>, CO, PM<sub>2.5</sub> and PM<sub>10</sub> emissions limits. (e.g., Warren County Landfill, NJ; Atlantic County Landfill, NJ; Greenville Gas Producers, SC). Nevertheless, for all these sources the emissions achieved in practice are much lower. Also, while Seneca Energy establishes their PM<sub>2.5</sub> and PM<sub>10</sub> BACT limit at 0.24 g/BHP- hr based on a CAT Model 3616 LFG engine's emissions, EPA's research shows that for a similar engine operated since 1998 at MM Tajiguas Energy LLC, CA the PM<sub>10</sub> BACT limit is at 0.066 g/BHP-hr.

As previously noted, EPA's review of Seneca Energy's CO actual stack data from their existing CAT G3516 and CAT G3520C engines indicates an excellent performance of these engines. Also, the CAT G3520C engine's actual NOx emissions limit calculated based on the highest mean ( that was recorded during the November 9, 2009 stack test run ), is 0.26 g/BHP-hr. Furthermore, the CAT G3520C engine's actual PM emissions determined based on the 99.7 % standard deviation is 0.10 g/BHP-hr.

Accordingly, EPA recommends that while establishing BACT limits, Seneca Energy should rely on their actual data rather than on data from a different site with a different landfill gas composition and engines' operating conditions. In addition, EPA believes that under no circumstances, should BACT emissions limits be established: (1) based on a small number of non complaint runs; and (2) at a higher level than the AP 42 emission factors.

EPA's review of Seneca Energy's linear regression models reveals that the model did not perform well for either CO or NOx. While, regression coefficient's values close to "1" (i.e., greater than 0.9) are an evidence of a strong linear relationship between the two variables (i.e., operating hours, and CO or NOx emissions), Seneca Energy's regression coefficients of 0.7 for CO and 0.47 for NOx suggest that there is not a strong relationship between the CO and NOx emissions, and the engines' operating hours. Whereas, we agree that there is a link between the concentrations of siloxanes and other impurities in landfill gas and the engines' wear, Seneca Energy's linear regression estimations for both CO and NOx and engines' operating hours are rather weak. Thus, in our judgment, Seneca Energy should disregard the CO and NOx emissions projected by the regression models.

In conclusion, by limiting its BACT analysis to emissions limits that are "among the best" Seneca Energy fails to satisfy the BACT requirements. Furthermore, another agency's determination that a given emission level is achievable, is by itself sufficient to conclude that is feasible for Seneca Energy, absent a clear demonstration that circumstances exist at Seneca Energy which distinguish it from the other sources with lower limits. (See, EPA's Draft NSR Workshop Manual (October 1990, p. B.29). Only after examination of all technologies, methods and processes of minimizing the emissions at "maximum degree of reduction" that is achievable, the applicant might claim that economic or other factors render a technology or lower emissions limits not achievable.

Therefore, please revise your application to include a BACT analysis following the "top-down approach" and addressing all the above-described issues.

### **Other Issues**

#### Fuel usage, heating value and air contaminants emission calculations

Based on your application, the air contaminant emission rates calculations were based on a maximum landfill gas consumption rate of 719 cfm for each engine and a minimum landfill gas lower heating value of 350 British Thermal Units (BTU) per cfm (BTU/cf). However, for the same landfill gas usage rate (cfm/engine) and higher landfill gas heating values, the engine's

BHP, the emission factors (g/BHP-hr) of air pollutants, and respectively the emissions rates may increase significantly. Please explain how you propose to ensure that the heating value of the landfill gas used for the engines will not exceed 350 BTU/cf. Please be as specific as possible.

#### Landfill Gas Heating Value

Please explain why Seneca Energy did not use the actual (measured) landfill gas heating value of 502 BTU/cf for their emission calculations, but a lower heating value of 350 BTU/cf was used instead.

#### Volatile Organic Compounds

Please revise the VOC emission rates calculations (pounds per hour lb/hr and tpy) using the actual VOC's concentration in the landfill gas sent to the engines and the engine's destruction efficiency. Also, please submit manufacturer's guarantees for the VOC estimated destruction efficiency.

#### Maximum Landfill Gas Usage Rate

The maximum landfill gas fuel usage rate of 719 cfm for each engine at 350 BTU/cf heating value of landfill gas, exceeds the manufacturer's maximum fuel rate for the same heating value. Please provide the manufacturer's guarantee that the emission factors will remain the same despite of increasing the fuel consumption rate.

#### Characterization of the landfill gas

The application specifies that Seneca Energy "uses methane -rich gas (exclusively) to fuel its engines (i.e., LFG that is generated by the Seneca Meadows Landfill). What is the methane content that makes the fuel a "methane-rich gas"? Does Seneca Energy receive only "methane rich gas"?

#### Startup and Shut -down periods

Please provide: (1) the duration (minutes) of each startup and shut down event; (2) the number of startup and shut down events /year /engine; and (3) the manufacturer's emission factors for the startup and shut down periods. However, if it has been determined that the LFG engines at the facility have the physical and operational ability of achieving continuous compliance with the emissions standards during the startup or shut down, please provide the manufacturer's guarantees showing that the engines are capable of complying with the same emission standards during startup or shut down as for 100 % load.

#### Design of Seneca Energy's engines

Please indicate whether Seneca Energy's engines, both new and existing, are adapted for landfill gas utilization. (i.e., low-energy-fuel engines). Also, please clarify whether the engines are equipped with spark/torch timing and duration controls, and turbocharged and intercooled induction air systems.

#### Siloxanes in landfill gas

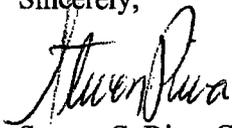
Please provide all available tests that support the actual siloxanes content in the landfill gas prior to combustion by Seneca Energy's engines.

Manufacturer's fuel quality specifications

Please submit a copy of the manufacturer's recommended maximum level of contaminants (i.e., siloxanes, sulfur compounds, halide compounds, particulates, etc.) in the fuel that would make possible to maintain optimum operating conditions for Seneca Energy's engines.

Once the above requested information is submitted to EPA, we will resume the PSD applicability review of this proposed project. If you wish to discuss any of the above issues or have any questions, please call Ms. Viorica Petriman of my staff at (212) 637-4021.

Sincerely,



Steven C. Riva, Chief  
Permitting Section  
Air Programs Branch

cc: Peter A. Lent  
NYSDEC- Region 8  
Division of Environmental Permits  
6274 East Avon Lima Road  
Avon, NY 14414-9519

Michele Kharroubi  
NYSDEC- Region 8  
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6274 East Avon Lima Road  
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

May 1, 2002

Gary E. Graham  
Environmental Engineer  
Commonwealth of Virginia  
Department of Environmental Quality  
Piedmont Regional Office  
4949-A Cox Road  
Glenn Allen, Virginia 23060

Re: Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generating Corporation

Dear Mr. Graham:

In your June 11, 2001, e-mail, you requested that the U.S. Environmental Protection Agency ("EPA") review the proposed project in which USA Waste of Virginia, Inc. (Maplewood's owner/operator) will sell its landfill gas to Industrial Power Generating Corporation ("INGENCO"), a power generating company. Your overarching question was whether Maplewood and INGENCO are under "common control" for purposes of determining whether Maplewood and INGENCO are a single stationary source under PSD and Title V. You also stated that landfill gas will comprise up to 70 percent of the INGENCO's fuel and want to know whether this is relevant to a common control determination.

Before addressing the question of common control, however, EPA would like to address compliance with the landfill gas regulations at 40 CFR Part 60, Subpart WWW, Standards of Performance for Municipal Solid Waste Landfills because a common control or source determination under PSD or Title V does not limit Maplewood's and INGENCO's obligations under Subpart WWW. EPA has consistently concluded that landfills are ultimately responsible for controlling landfill gas. (*See, e.g.*, the attached June 21, 2000, letter to Robert Koster, Lane County Air Pollution Authority from Douglas E. Hardesty, EPA, Region 10). If the landfill gas is sold, responsibility for compliance is not sold as well. Moreover, compliance responsibility cannot be apportioned according to the percentage of gas burned at each facility. If EPA determines that landfill gas is not being controlled in compliance with Subpart WWW, EPA would consider taking enforcement action against Maplewood and INGENCO, no matter which company is burning the gas.

Your common control question goes to the larger question of whether the Maplewood Landfill and the INGENCO power generation facility should be considered a single stationary source under PSD and Title V. The PSD regulations define a stationary source as all of the pollutant-emitting activities that belong to the same industrial grouping, are located on one or



more adjacent or contiguous properties, and are under the control of the same person. 40 C.F.R. 51.166(b)(5) &(6). The Title V regulations adopt a similar definition. (See 40 C.F.R. 70.2) As the INGENCO facility will be located on Maplewood property, the two facilities are located on "adjacent or contiguous properties." Thus, if the INGENCO facility and Maplewood also belong to the same industrial grouping and are under common control, then they would constitute a single source for purposes of PSD and Title V.

EPA has provided a great deal of guidance to States and sources regarding determinations of this nature since 1980. Issues of common control, in particular, have been discussed in EPA a September 18, 1995, letter to Peter Hamlin, Iowa Department of Natural Resources, from William Spratlin, U.S. EPA ("Hamlin letter," copy enclosed). Other EPA guidance and correspondence can be found at:

<http://www.epa.gov/region07/programs/artd/air/policy/search.htm>

EPA's assessment of the question of common control is based on its understanding of the arrangement between INGENCO and Maplewood. Under the terms of the landfill gas purchase agreement, Maplewood has agreed to sell to INGENCO all of its landfill gas. INGENCO is obligated to pay for all of the gas that Maplewood provides, even if INGENCO does not use the gas. Consistent with the landfill gas purchase agreement, it is our understanding that INGENCO has built an electricity generating plant on undeveloped property, leased from Maplewood, and located next to the landfill. This plant is owned and operated by INGENCO. The engines at the INGENCO facility are to run on various types of liquid fuel, including diesel, supplemented by Maplewood's landfill gas. INGENCO has asserted that its engines can run solely on these liquid fuels, but cannot be operated using only landfill gas. Therefore, EPA understands that INGENCO must have fuel vendors other than Maplewood Landfill in order to operate the electricity generating plant.<sup>1</sup> Nonetheless, up to 70% of INGENCO's fuel needs could be met by Maplewood's landfill gas.

As explained in the Hamlin letter, the fact that INGENCO will be located on property owned by Maplewood creates a presumption of common control. Moreover, the fact that Maplewood's entire output of landfill gas will be purchased by INGENCO further supports this presumption, as does the likelihood that a high percentage of INGENCO's fuel needs will be met by Maplewood's landfill gas. However, determinations of this nature are very source-specific, and in a situation such as this the permitting authority may find it necessary to look carefully at the contracts or lease agreements between the parties, and other relevant information before reaching a determination. (See, e.g. the August 2, 1996, memorandum from John S. Seitz, "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act"). Thus, in answer to one

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<sup>1</sup> For purposes of PSD and Title V, INGENCO's potential to emit should be based on an air emissions "worst case scenario" and the type of fuel used at the facility. Similarly, the calculation of Maplewood's potential to emit should reflect the fact that the landfill may flare all of the landfill gas it produces.

of your questions, the percentage of Maplewood's landfill gas that INGENCO burns relative to some other type of fuel may have some significance to a determination of common control, but is only one of many factors to be considered.

There are a number of factors supporting a determination that INGENCO and Maplewood are *not* under common control. Under the terms of the agreement between INGENCO and Maplewood, INGENCO is responsible for all capital improvements on the leased property to create the electricity generating plant. Maplewood, in turn, will continue to own and operate the landfill gas collection system and the flare that burns the landfill gas. If the landfill gas is not used or resold by INGENCO, the gas will be flared at the Maplewood facility. INGENCO will control the valve that shunts the landfill gas to the electricity generating engines or to Maplewood's flare.

In addition, based on statements in correspondence from Maplewood and INGENCO, conversations with a representative of USA Waste of Virginia, Inc., and a review of Dun and Bradstreet's reports, EPA has concluded that Maplewood and INGENCO have no financial interest in one another. EPA has found no indication that the companies have common employees, officers, or members of their respective governing boards, or that they share equipment (including pollution control equipment), payroll activities, employee benefits, health plans, or other administrative functions. Also, neither facility has control over the other's compliance responsibilities. The landfill and INGENCO do not share intermediates, products, byproducts, manufacturing equipment, or property other than as explained above. That is, INGENCO has leased property from Maplewood and will purchase some percentage of its fuel from Maplewood. Maplewood, however, currently receives its power through a local power utility and there is no indication that it will receive power directly from INGENCO. There are also no arrangements for Maplewood to accept INGENCO's municipal solid waste. Finally, neither facility is dependent on the other; if either Maplewood or INGENCO shuts down, the other facility can continue to operate at full capacity.

Your request for EPA's opinion also referred to EPA's February 11, 1998, letter to Terry Godar, VADEQ that addressed common control for another Virginia landfill. In its letter to EPA, VADEQ noted that "The gas collection and the control system ... [landfill gas energy recovery]... will be located on the landfill property *and will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery.*" (emphasis added). EPA cited this interdependence between the landfill and the gas collection and control system as an indication that the two facilities were under common control.

In contrast to the situation outlined in the original letter from VADEQ, INGENCO's facility does not need landfill gas to operate; the engines at use at the facility can run exclusively on liquid fuels such as diesel. In addition, Maplewood owns and controls its gas collection system and will continue to maintain its own flare. Maplewood accordingly does not need INGENCO to destroy the landfill gas as required by 40 CFR part 60, subpart WWW. Based on our understanding of the facts of this situation, it appears that the purpose of the USA Waste of Virginia, Inc./INGENCO purchase agreement is to allow INGENCO to purchase landfill gas to either run its engines or to sell to other purchasers; not to destroy nonmethane organic

compounds ("NMOC"). These are important differences from the situation described in the letter to Mr. Godar.

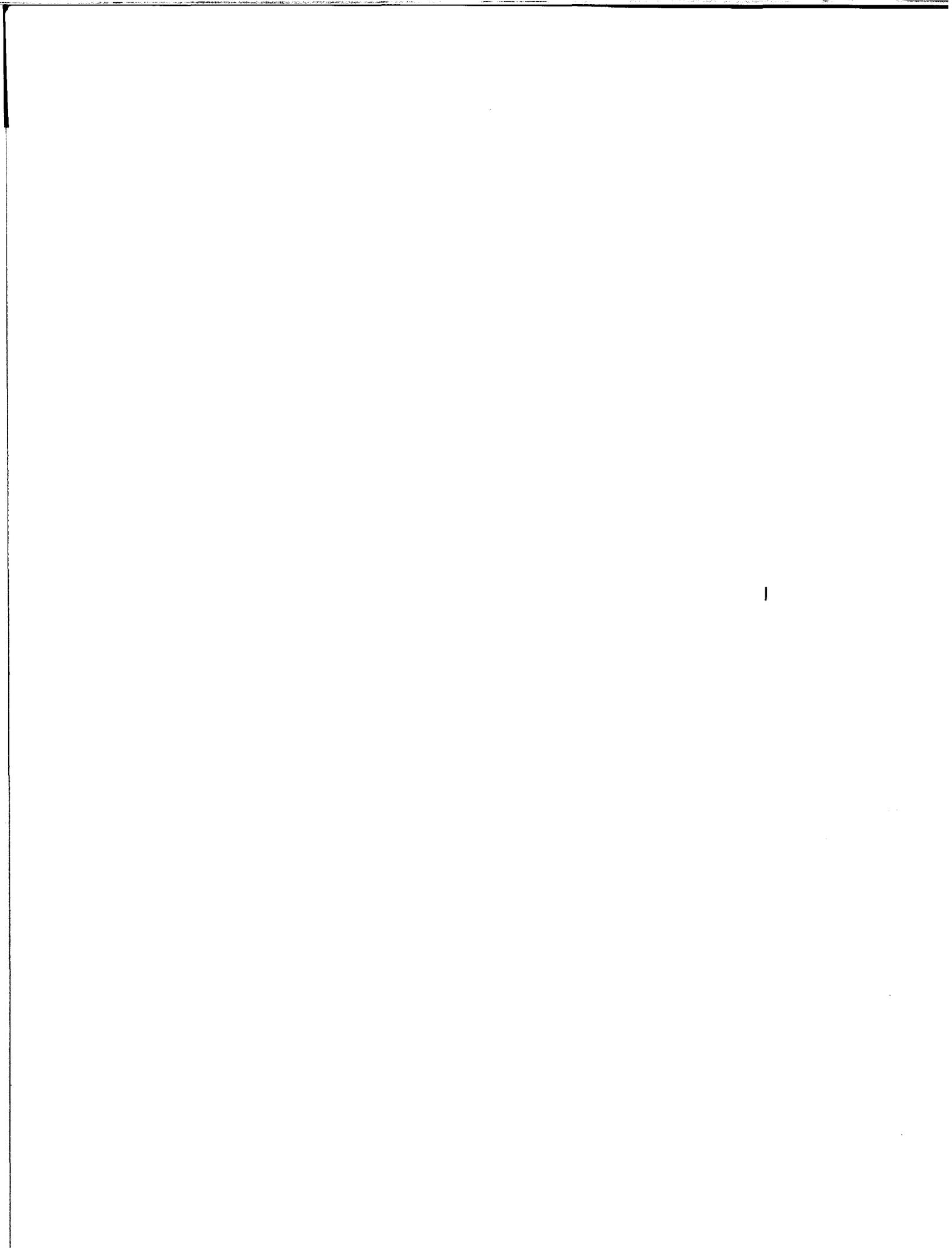
The Commonwealth of Virginia has been granted full approval of the PSD and Title V operating permits programs. As the permitting authority, you must ultimately determine whether Maplewood and INGENCO are under common control for purposes of implementing your PSD and Title V programs. However, if EPA were making the determination, we would find, based on the facts outlined above, that Maplewood and INGENCO are not under common control. Despite the presumption of common control discussed above, the "major" indicators of common control (*see* Hamlin letter at 2) do not point towards such a finding. Therefore, EPA would not consider these two facilities to be one source under PSD or Title V.

If you have additional questions about this, or other issues, call Bowen (Chip) Hosford at (215) 814-3158.

Sincerely,

Judith M. Katz, Director  
Air Protection Division

- Enclosures:
- 1) Letter to Robert Koster, Lane County Air Pollution Authority from Douglas E. Hardesty, EPA, Region 10, June 1, 2000
  - 2) Letter to Peter Hamlin, Iowa Department of Natural Resources, from William Spratlin, U.S. EPA, September 18, 1995
  - 3) Memo from John S. Seitz, EPA, "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act," August 2, 1996
  - 4) Letter to Terry Godar, Virginia Department of Environmental Quality, from Makeeba A. Morris, EPA, February 11, 1998





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
841 Chestnut Building  
Philadelphia, Pennsylvania 19107-4431

February 11, 1998

Terry Godar, P.E.  
Manager  
Virginia Department of Environmental Quality  
Northern Virginia Regional Office  
Woodbridge, VA 22193

Air Permit

Dear Mr. Godar:

Thank you for your April 28, 1997 letter regarding the applicability of Title V requirements for municipal solid waste (MSW) landfills under 40 CFR part 60, subpart WWW new source performance standards (NSPS).

The questions raised in your letter are similar to ones raised in a November 1996 letter by the Maryland Air and Radiation Management Administration (MARMA) to EPA. Because of the relevance of MARMA's questions and EPA's responses to them, we have enclosed a copy of our response letter, including the enclosures, for your use and information. The EPA letter to MARMA addresses questions relating to classifying MSW landfill emissions as non-fugitive emissions, the calculation of potential emissions at a landfill, and determining whether a landfill is a major source under title V of the Clean Air Act (CAA). As with the MARMA letter, your letter raises complex questions that involve ongoing EPA Headquarters policy decisions. For this reason, we have not been able to provide you with a more timely response.

As you may know, since the Summer of 1996, EPA has been involved in litigation over the requirements of the MSW landfill rule. On November 13, 1997, in accordance with section 113(g) of the CAA, EPA issued a notice in the Federal Register (62 FR 60898) of a proposed settlement in National Solid Wastes Management Association v. Browner, et al., No. 96-1152 (D.C. Cir). It is important to note that the proposed settlement does not vacate or void the existing landfill rule. Accordingly, the currently promulgated MSW landfill rule, the Title V rule at 40 CFR part 70, EPA Region 3's letter to MARMA, and other EPA guidance documents serve as a basis for this response. This response has been coordinated with staff in the Office of Air Quality Planning and Standards, the Office of Enforcement and Compliance Assurance, and the Office of General Counsel in order to help assure completeness and accuracy. Given below is our response to your questions, and, as necessary, comments on your "given" statements preceding each question in your letter.

## Question #1

### Given Department of Environmental Quality (DEQ) Statements/EPA Comments:

*Statement # 1.* Minor NSPS sources may be deferred from initial part 70 permitting. (Virginia has adopted this option).

*EPA Comment:* Certain nonmajor sources, i.e., area sources, have been deferred from initial part 70 permitting; others have not.

First, section 502(a) of the CAA requires sources, including nonmajor sources, that are subject to standards or requirements under section 111 or 112 of the CAA to obtain Title V permits. If a promulgated section 111 or 112 standard is silent on whether nonmajor sources under the standard are to be permitted, then the nonmajor sources are by default required to get Title V permits. However, it is important to note two exceptions to this statement:

- 1) Nonmajor sources subject to section 111 and 112 standards which were promulgated **prior** to July 21, 1992 have been deferred from permitting until EPA completes a rulemaking to determine how the Title V program should be structured for nonmajor sources and the appropriateness of any permanent exemptions [section 70.3(b)(1)]. (The MSW landfill rule was promulgated on March 12, 1996 and is therefore not affected by this part 70 provision.)
- 2) Through rulemaking actions (proposed December 13, 1995; promulgated June 3, 1996), EPA decided to defer or exempt nonmajor sources subject to certain section 112 standards promulgated after July 21, 1992 from Title V permitting. These rulemaking actions did not, however, address NSPS standards, including the landfill rule.

Nevertheless, nonmajor MSW landfills which have a design capacity *less than* 2.5 million megagrams or 2.5 million cubic meters have been exempted from the requirement to apply for a Title V permit as a result of 40 CFR part 60, subparts Cc and WWW. However, if these landfills are subject to Title V for other reasons, they are still required to obtain a Title V permit.

Second, it is important to remember that an MSW landfill of any size could be considered a major source under the CAA. Major source status is based on what a source emits or has the potential to emit. For part 70 permitting purposes, a landfill could be classified as a major source under one or more of three major source definitions in Title V: (1) section 112, (2) section 302, or (3) part D of Title I.

*Statement # 2.* Subpart WWW states that all MSW landfills with a design capacity greater than 2.5 million megagrams are subject to part 70 permitting (section 60.752(b)).

*EPA Comment:* We agree. It should be noted that section 60.752(b) also stipulates a 2.5 million cubic meters applicability threshold. A MSW landfill with a design capacity *greater than or equal to* either of these thresholds is subject to part 70 permitting.

*Statement # 3.* A landfill that has a design capacity greater than 2.5 million megagrams may be a minor source. (Preamble to final subpart WWW).

*EPA Comment:* Assuming that a minor source is equivalent to a nonmajor source, this statement is true. However, section 60.752(b) states that the owner or operator of an MSW landfill subject to subpart WWW with a design capacity *greater than or equal to* 2.5 million megagrams or 2.5 million cubic meters is subject to part 70 permitting requirements; this subpart WWW requirement is independent of any potential to emit requirement.

*Statement # 4.* The regulated pollutant for landfills is landfill gas, measured as NMOC. Landfill gas contains VOCs and HAPs. Emissions of NO<sub>x</sub>, SO<sub>2</sub>, PM, etc., from the control device are "secondary emissions" (preamble to final subpart WWW) which are not included in determining major source status ((draft new source review (NSR) workbook)).

*EPA Comment:* In regard to your first statement, it is important to note that a landfill can be a major source for one or more pollutants, of which NMOC is but one. Under the section 112 major source definition, the pollutants of concern are listed in section 112(b) of the Act and codified in 42 U.S.C. 7412(b)(1). (The codified list contains any modifications to the 112(b) list.) Under section 302 and part D of Title I, a landfill could be a major source for any of the non-HAP pollutants listed in the proposed NSR rule of July 23, 1996 (61 FR 38250, 38310).

The third sentence of your statement is **not** correct. For NSR and Title V applicability purposes, EPA classifies emissions as being either fugitive or non-fugitive, whether or not they are controlled or uncontrolled. There is no definition of "secondary emissions" in 40 CFR part 70, the General Provisions for part 60, or subpart WWW of part 60. In the context of NSR requirements, secondary emissions are defined as emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but **do not come from the major stationary source or major modification itself.** [Emphasis added.] (See for example the definition of secondary emissions in 40 CFR 52.21.) Therefore, emissions of NO<sub>x</sub>, SO<sub>2</sub>, PM, etc. which results from the application of control devices to the source itself (in this case a landfill) are not considered secondary emissions, and must be counted in major source determinations and are subject to all applicable requirements.

*Statement # 5.* Until an existing landfill installs a collection and control system, the emissions are fugitive and do not count towards determining major status for NSR or part 70 permitting. (John Seitz October 21, 1994 guidance pertaining to existing landfills.)

*EPA Comment:* For any designated facility (i.e., existing landfill) under subpart Cc, the MSW Landfill Emission Guidelines, the given statement is **not** correct. Emissions which are **reasonably collectable** are non-fugitive emissions and must be counted in determining the potential to emit for a landfill. **What is considered reasonably collectable is based on what similar landfills are collecting regardless of whether the landfill in question actually captures emissions or not.** For purposes of the NSR program, EPA has concluded that it is reasonable to assume that landfill gas can be collected at landfills constructed, or expanded

beyond their currently-permitted capacity<sup>1</sup>, on or after October 21, 1994. Please see the enclosed October 21, 1994 memo from John Seitz, Director, Office of Air Quality Planning and Standards, entitled "Classification of Emissions from Landfills for NSR Applicability Purposes." For landfills constructed or expanded prior to October 21, 1994, if the applicability determinations made for these landfills were correct for that time, those decisions will not be revisited.

The criteria established in NSR for determining which emissions are non-fugitive are also applicable for two of the major source definitions under Title V, i.e., the section 302 and part D of Title I major source definitions. As a result, any Title V major source determinations made under these two definitions on or after October 21, 1994 must consider any reasonably collectable emissions as non-fugitive emissions and must, as a result, count these emissions toward determining a landfill's major source status. As of October 21, 1994, there were no permitting authorities which had received final approval of their Title V programs. As a result, unless permitting authorities were requesting Title V applications from sources prior to October 21, 1994, all MSW landfill owners or operators must count their reasonably collectable emissions toward determining major source status under these two Title V major source definitions.

It is important to clarify that under the section 112 major source definition in Title V, all hazardous air pollutants, whether the emissions are considered fugitive or non-fugitive, must be counted toward determining whether a source is a major source. Please see the enclosed MARMA letter for more discussion on the major source definitions under Title V.

*Statement # 6.* Without a gas collection system, it is not possible, from a technical standpoint, to determine whether or not a landfill is major for HAP or VOC emissions.

*EPA Comment:* This statement is **not** correct. It is technically possible to estimate the emissions from a landfill source where a gas collection system is not in place, just as emissions can be estimated for other sources which do not have systems to collect emissions. For determining whether a landfill is a major source, EPA encourages site-specific source testing of landfill gas to determine its constituent pollutants and their concentrations. Use of actual emissions data reduces the uncertainties associated with using the emission factor concentrations provided in EPA's AP-42, Compilation of Air Pollutant Emission Factors.

In the absence of actual emissions data, however, the preferred method for estimating MSW landfill emissions for major source determinations is use of EPA's AP-42. Table 2.4-1 in AP-42 contains a list of numerous HAP and VOC emissions concentrations for uncontrolled landfills. However, it is important to note that sources need to consider all pollutants for which they could be considered a major source, some of which may not be included in Table 2.4-1. (See EPA's comment on Statement #4.) Emission estimating procedures, other than AP-42, may be acceptable, as determined by the permitting authority.

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<sup>1</sup> The currently-permitted capacity of a landfill is in reference to whatever permit the landfill owner or operator holds at the time that the landfill begins to expand, e.g., air permit or solid waste permit.

An updated version of AP-42 landfill emission factors was placed on the EPA website on September 30, 1997 and will be published by the Government Printing Office in paper in Supplement D to the 5th Edition on or about January 1999. The updated emission factors can now be accessed at the following website address: <http://www.epa.gov/ttn/chief/ap42etc.html>. Emission factors relative to landfills are located in chapter 2, section 4. A copy of these revised AP-42 emission factors is enclosed. It is important to emphasize that in order to appropriately apply various emission factors to landfills, a permitting authority should thoroughly review the background document for landfills. This document can be accessed at the following website address: <http://www.epa.gov/ttn/chief/ap42back.html>.

Finally, it is important to emphasize that major source status under the CAA is based on what a source emits or **has the potential to emit**.

### ***DEQ Question #1***

When does an NSPS subpart WWW landfill become a major source?

*EPA Response:* A landfill becomes a major source when it emits or has the potential to emit major amounts of any 112(b) pollutant or any pollutant of concern under section 302 or part D of Title I. (See EPA's comment on Statement #4.) NMOC became pollutants to consider in major source determinations as a result of the promulgation of the NSPS for landfills on March 12, 1996. This question is also addressed on pages one and two of the enclosed MARMA letter.

### **Question # 2**

#### **Given DEQ Statements/EPA Comment:**

*Statement # 1.* A landfill which is subject to NSPS subpart WWW is preparing to install a gas collection and control system.

*Statement # 2.* The gas collection system and the emissions control system (landfill gas energy recovery) will be owned and operated by separate third parties under contract with the landfill owner.

*Statement # 3.* The gas collection and the control system will be located on the landfill property and will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery.

*EPA Comment:* We have no comment on any of the above three given statements.

### ***DEQ Question #2 and Conclusion***

How many sources are there and who are they?

Your conclusion was as follows: "Based on these activities being co-located, and mutually dependent, I concluded that the gas collection and the energy recovery-gas control system would be under the control of the landfill operator and, as such, should be considered as one source for NSR and for Title V applicability. For permitting purposes, the landfill, the gas collection operator, and the energy recovery operator would be registered and permitted separately, with the landfill owner's permit containing conditions that apply in the event of a noncompliance by either the gas collection operator or the energy recovery operator."

*EPA Response:* We agree with your conclusion that there is one source at the landfill. Under all three major source definitions under Title V (section 112, section 302, or part D of Title I), a stationary source is determined by aggregating sources which are (1) located on one or more contiguous or adjacent properties and are (2) under common control. Regardless of which major source definition is being considered, we conclude that the landfill and gas collection and control systems are one source.

One aspect of the above that may warrant further discussion is in regard to how we determined the landfill and the gas collection and control systems to be under "common control," given that the gas collection and control system will be owned and operated by separate third parties. All three statements that you provided support the conclusion that the landfill and the gas collection and control system must be considered under "common control" for Title I and Title V purposes.

Although the gas collection and control system is owned and operated by separate third parties, the owners of the gas collection and control system are under contract with the owner of the landfill. In a November 16, 1994 letter to Lisa Thorvig, Division Manager, Air Quality Division, Minnesota Pollution Control Agency from John Seitz, Director, OAQPS, the following is stated: "It is important to note that there are no provisions in Title I or Title V of the Act, or in regulations developed pursuant to them, for excluding contracted or temporary operations in defining major sources. Accordingly, it is the EPA's policy that temporary and contractor-operated units are included as part of the source with which they operate or support." (Please see the enclosed letter.)

The gas collection and control system will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery. As you have noted, this interdependence between the landfill and the gas collection and control system further indicates that both installations are under common control. For more background on common control issues, please see the enclosed letter to Peter Hamlin, Chief, Air Quality Bureau, Iowa Dept. of Natural Resources from William Spratlin, Director, Air, RCRA, and Toxics Division, Region VII, U.S. EPA, dated September 18, 1995.

Lastly, on a separate but related issue, we would like to emphasize that if permitting authorities allow separate permits to be issued to landfills and gas collection and control systems which are considered one source, those permits cannot be issued in a way that changes how the landfills or the gas collection and control systems would be subject to and comply with any applicable requirements, compared to what would otherwise occur if the source was issued a single Title V permit. A particular challenge with issuing multiple landfill permits is the difficulty of splitting the

NSPS or EG requirements among two or more permits. As a result, EPA suggests that one permit be issued to the source described above, with the permit clearly identifying the owner/operator of the landfill, the owner/operator of the gas collection system, and the owner/operator of the energy recovery-gas control system. Additionally, it is important to note that the number of permits issued to a source does not limit the liability of any of the owners/operators or contractors at the source, e.g., the owner/operator of the landfill.

We hope the enclosures combined with the above comments and responses to your questions meet your informational needs. However, if you have additional questions or concerns, please feel free to contact James B. Topsale of my staff at (215) 566-2190.

Sincerely,

/s/

Makeba A. Morris, Chief  
Technical Assessment Section

Enclosures(4):

1. Compilation of Air Pollutant Emission Factors, chapter 2, section 4, Municipal Solid Waste Landfills (Supplement D), September 1997.
2. June 9, 1997 letter from Makeba A. Morris, EPA Region III, to Carl R. York, Chief, Regulation Development Division, Maryland Air and Radiation Management Administration, w/ enclosures (5).
3. November 16, 1994 letter from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Lisa J. Thorvig, Division Manager, Air Quality Division, Minnesota Pollution Control Agency.
4. September 18, 1995 letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources, w/ enclosure.

J



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
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NEW YORK, NY 10007-1866

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Commissioner Erin M. Crotty  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-1011

Re: EPA's Review of Proposed Permit for Al Turi Landfill  
Permit ID : 3-3330-00002/00039, Mod 1

Dear Commissioner Crotty:

The purpose of this letter is to notify the New York State Department of Environmental Conservation (DEC) that the United States Environmental Protection Agency (EPA) formally objects to the issuance of the above referenced proposed title V operating permit for Al Turi Landfill, located in Goshen, New York, operated by Al Turi Landfill, Inc.

Section 505(b)(1) of the Clean Air Act (the Act) and 40 C.F.R. § 70.8(c) require EPA to object to the issuance of a proposed permit in writing within 45 days of receipt of the proposed permit (and all necessary supporting information) if EPA determines that it is not in compliance with applicable requirements under the Act or 40 C.F.R. Part 70. Pursuant to 70.8(c), a detailed explanation of the objection issues and the changes necessary to make the permit consistent with the requirements of 40 C.F.R. Part 70 is provided in the attachment to this letter. In summary, the basis of EPA's objection is that the proposed permit (1) incorrectly treats Al Turi Landfill as a source separate from the landfill gas control facility; (2) misrepresents the landfill gas control devices in use; (3) does not reflect the responsibility of Al Turi Landfill for compliance with all requirements for control of the landfill gas; (4) does not satisfy the annual certification requirements of § 114(a)(3) of the Act and 40 C.F.R. § 70.6(c)(5); and (5) does not include all of the requirements of the National Emission Standard for Hazardous Air Pollutants: Municipal Solid Waste Landfills.

In addition, on January 30, 2004, the Administrator signed an Order granting the Petition filed by the New York State Public Interest Research Group in part and denying the Petition in part. See *In the Matter of Al Turi Landfill, Inc.*, Petition No. II - 2002-13-A (January 30, 2004). The Administrator's Order required DEC to make changes to or explain certain specific conditions in Al Turi's proposed permit, which this permit modification (Mod 1) fails to include. The outstanding issues granted in the Order are that the proposed permit: (1) does not explain in its Permit Review Report the options available in the regulation for nitrogen and oxygen concentrations and monitoring at the gas collection system wellheads; (2) does not explain the applicability of Condition 3 (Condition C in the Mod 1) and Condition 7 (Condition G in Mod 1).

Internet Address (URL) • <http://www.epa.gov>

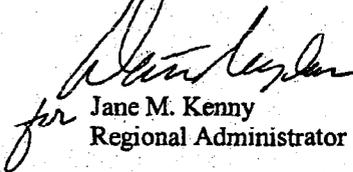
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to the Al Turi Landfill; and (3) does not include the "excuse" provision that is in New York's SIP approved by EPA at 6 N.Y.C.R.R. § 201.5. DEC is on notice that these issues were not corrected in Mod 1 and are currently outstanding. If DEC fails to implement these requirements, EPA will act to issue a part 71 permit as explained below. Enclosed is an attachment that details all the issues referenced in this letter.

The DEC is expected to submit a second permit modification (Mod 2) to EPA by July 19, 2004. The DEC is encouraged to correct both the outstanding issues from the Administrator's January 30, 2004 Order, as well as the issues addressed in this objection letter within this second permit modification. Should the DEC fail to make the necessary corrections to the Al Turi permit by Mod 2, EPA will use its authority under Section 505(c) of the Act to issue or deny the permit under 40 C.F.R. Part 71.

We are committed to working with you to resolve these issues. Please let us know if we may provide assistance to you and your staff. If you have questions or wish to discuss this further, please contact Mr. Steven C. Riva, Chief, Air Permitting Section at (212) 637-4074.

Sincerely,

  
for Jane M. Kenny  
Regional Administrator

Attachment

cc: David Shaw, Director, Division of Air Resources, NYSDEC, Albany  
Margaret Duke, Regional Permit Administrator, NYSDEC, Region 3  
Robert Stanton, Regional Air Pollution Control Engineer, NYSDEC, Region 3  
Tracy Peel, New York Public Interest Research Group  
Gary Abraham, Esq.

Joseph Gambino  
Al Turi Landfill, Inc.  
73 Hartley Road  
Goshen, NY 10924

Attachment

to 7/8/04 EPA Region 2  
Letter to  
NYSDEC

**Objection Issues and Outstanding Issues  
Proposed Part 70 Permit  
Al Turi Landfill, Inc.  
Al Turi Landfill  
Permit ID: 3-3330-00002/00039, Mod 1**

**(1) The proposed permit does not treat Al Turi Landfill and Al Turi LFGTE-1 (also referred to as "Ameresco LFG-1") as a single source with the result that all applicable Federal requirements have not been addressed.**

The Description section of the proposed Mod 1 permit states that DEC has determined that Al Turi Landfill and Al Turi LFGTE-1 are not under common control, and, ostensibly, therefore not a single source. The Permit Review Report states that Al Turi LFGTE-1 is a separately owned/operated and permitted gas-to-energy facility that is owned/operated by Ameresco, Inc.

Based on information provided in the proposed Mod 1 permit and in a letter from the attorneys for Al Turi Landfill, Beveridge & Diamond, P.C., the determination and statement by DEC that Al Turi Landfill and Al Turi LFGTE-1 are not under common control is incorrect. That these two facilities are a single source for Clean Air Act Title V and New Source Review (NSR) purposes is delineated below. Consequently, the permit must be modified to reflect this single-source status. The Al Turi Landfill permit must be revised to include the emission units, processes, and emissions for the landfill gas controls, and all Federal applicable requirements for those units, processes, and emissions. With this redefinition of the permitted facility, DEC must recalculate the potential to emit for Al Turi Landfill.

The formal single source determination prepared by EPA follows.

On January 21, 2004 the EPA reopened the Al Turi permit for cause pursuant to 40 C.F.R. § 70.7(g). In the Response to Comments within permit Mod 1, the DEC relied upon a letter submitted to it on April 22, 2004 by Mr. Christopher J. McKenzie of Beveridge & Diamond, P.C., the attorney for Al Turi landfill, to hold that Al Turi Landfill, Inc. ("Al Turi") and Al Turi LFGTE ("Ameresco") were not a single source for both Title V and NSR applicability purposes. A single source determination consists of a three factor test set out under the definition of "major source" in 40 C.F.R. § 70.2, as well as under the definition of "building, structure or facility" in 40 C.F.R. § 51.166. Under the definition of "major source" in 40 C.F.R. § 70.2 two facilities are considered a single source if they are (1) under common control, (2) contiguous or adjacently located and (3) have the same two-digit SIC code. The DEC did not present its own analysis of the factors of the test, nor did it determine whether or not each of the factors was present when making its single source determination within permit Mod 1. Rather, the DEC

attached excerpts of the letter submitted by Al Turi's attorney, Mr. McKenzie, and concurred with his determination, that Al Turi and Ameresco were separate sources for Title V and NSR applicability purposes.

On March 11, 2004 the DEC requested a ninety day extension from Jane M. Kenny, Regional Administrator, EPA, Region 2, in order to respond to the January 21, 2004 reopening for cause. The request was made, in order to obtain more information from Al Turi for the single source determination. This determination was to be made by DEC within the permit Mod 2. However, the DEC stated that Al Turi and Ameresco were not a single source within its response to comments within permit Mod 1, including excerpts of the analysis submitted by Mr. McKenzie within its Permit Review Report. In addition, a draft of the Permit Review Report of permit Mod 2, submitted by DEC, includes excerpts of Mr. McKenzie's letter. Again, the DEC relies upon the information provided in Mr. McKenzie's April 22<sup>nd</sup> letter to find that Al Turi and Ameresco are two separate sources for Title V and NSR applicability purposes.

Although Mr. McKenzie's letter to the DEC asserts that Al Turi and Ameresco should not be treated as a single source, an analysis of the information provided within the letter leads to the conclusion that the three factors required to treat Al Turi and Ameresco as a single source are present in this case. In the April 22<sup>nd</sup> letter, Mr McKenzie states that Al Turi and Ameresco are located on adjacent property and share the same two-digit SIC code (Major Group 49: Electric, Gas, and Sanitary Services - 4953: Refuse Systems, 4911: Electric power generation, transmission or distribution). As a result, the adjacency and SIC code factors of the test have been met.

The only remaining factor is common control. Mr. McKenzie's letter focuses primarily on this factor. A letter, written by William Spratlin, then Division Director of the Air, RCRA, and Toxics Division, EPA, Region 7, and dated September 18, 1995, outlined seven factors that can be examined when making a common control determination. Mr. McKenzie provided the DEC with answers to the seven factors. 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. Thus, even though two facilities may not have common officers, plant managers or workforces, they may still be under common control.

The major factor to examine in Director Spratlin's letter regarding Al Turi and Ameresco is whether or not the two facilities are inter-dependent. Ameresco purchases all of Al Turi's landfill gas and all of its energy needs from Al Turi. Based upon its proposed permit and permit Mod 1 Al Turi sells its landfill gas to Ameresco, which converts the landfill gas to electricity. This is the means by which Al Turi has chosen to meet the requirements of the New York State Landfill Plan, 6 N.Y.C.R.R. Part 208, rather than install a collection and control system. Thus, Ameresco controls the landfill gas emitted from Al Turi. In the April 22<sup>nd</sup> letter, Mr. McKenzie states that the control equipment is

owned and operated by Ameresco (the engines and back-up flares), and therefore is not owned or operated by Al Turi. Rather, Mr. McKenzie states that, within its purchase agreement Al Turi has a first option to buy back the flares should Ameresco no longer wish to purchase its landfill gas from Al Turi. A first option to buy does not constitute physical possession of the flares, and therefore an independent relationship from Ameresco. Without independent ownership of the flares Al Turi is fully dependent upon Ameresco for the treatment and control of its landfill gas.

Ameresco is equally dependent upon Al Turi as its main fuel supplier. Mr McKenzie's letter further states that Ameresco is not contractually obligated to purchase 100% of its gas supply from Al Turi, since it is allegedly allowed to supplement and/or blend the landfill gas with alternative fuel at Ameresco's discretion. However, the letter provides that the purchase agreement contractually obligates Ameresco to purchase whatever landfill gas Al Turi sends to Ameresco. Presently, it 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. In turn, as previously established, Al Turi is dependent upon Ameresco, since Ameresco houses the control equipment for the landfill. All the control equipment, including the back-up flares are owned and operated by Ameresco. Should Ameresco choose to not treat and control its landfill gas, Al Turi will be in violation of the New York State Landfill Plan until it exercises its option to buy back the flares from Ameresco within its purchase agreement. Since Al Turi and Ameresco are inter-dependent upon one another common control is established under the criteria within Director Spratlin's letter. Again, only one factor need be present, in order to establish common control between two facilities. The inter-dependent relationship between Al Turi and Ameresco through the facts presented is enough to establish common control in and of itself and is the main focus of this determination. However, common control can be established through two of the other seven factors within the Spratlin letter as well.

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WRONG

A second factor within Director Spratlin's letter that may be used to establish common control is the support factor. Mr McKenzie's letter, dated April 22, 2004, references a support relationship between Al Turi and Ameresco. The April 22<sup>nd</sup> letter does not state that the purchase agreement between Al Turi and Ameresco provides for a set price to be paid by Ameresco to Al Turi for its landfill gas. Rather, Al Turi receives a percentage of Ameresco's revenues realized by the sale of electricity or other products of the landfill gas generated at Ameresco. Thus, Al Turi's revenues are directly connected to Ameresco's revenues. An increase in Ameresco's revenues means an increase in Al Turi's revenues. Alternatively, a decrease in Ameresco's revenues means a decrease in Al Turi's revenues. Although all of Al Turi's revenues may not be connected to Ameresco, some support relationship has been demonstrated by the facts presented.

A third factor is whether or not the two facilities share control equipment and whether or not the management decisions of one facility can affect pollution control at the other facility. Al Turi's landfill gas is sent to Ameresco where it is treated and controlled at Ameresco. Ameresco converts the Al Turi landfill gas that it has treated and controlled to electricity. The control equipment although located at Ameresco meets the needs of both facilities. Without the control equipment at Ameresco, Al Turi could not meet the requirements of the New York State Landfill Plan without putting in its own collection and control system. Thus, these two facilities also share control equipment. In addition, any decisions made at Ameresco regarding the control equipment affect Al Turi. Should Ameresco shutdown the control equipment, Al Turi will not be able to comply with the New York Landfill Plan. Thus, the management decisions at Ameresco affect pollution control at Al Turi, since Al Turi's pollution equipment is owned and operated by Ameresco.

Lastly, Mr. McKenzie compares the Al Turi matter to a single source determination in a letter dated May 1, 2002 by EPA, Region III, regarding Maplewood Landfill (hereafter referred to as "Maplewood"). The distinguishing factor between the Al Turi situation and Maplewood is that the back-up flares were located at Maplewood. As stated above, an option to buy does not constitute physical possession of the flares. Unlike Al Turi, the landfill in Maplewood owned and operated the back-up flares. Thus, should INGENCO choose to suddenly stop treating and controlling Maplewood's landfill gas, INGENCO had a backup system in place. Unlike Maplewood, Al Turi does not have physical possession of the back-up flares. Al Turi must purchase the flares from Ameresco should Ameresco decide to stop purchasing its landfill gas. Should anything go wrong at Ameresco, Al Turi does not have a back-up system in place at its own facility to make it truly independent of Ameresco.

A second factor that differs between Maplewood and Al Turi was Maplewood's use of other fuel sources. In Maplewood 70% of INGENCO's fuel supply came from Maplewood. Mr. McKenzie's letter states that it is not contractually obligated to obtain its gas supply solely from Al Turi. Although Ameresco can supplement its fuel supply from other fuel sources, it is contractually obligated to purchase all the landfill gas Al Turi provides, whatever that may be. At present it purchases 100% of its gas supply from Al Turi. Ameresco's fuel supply appears to be dependent upon what Al Turi sends it. Thus, at present Ameresco purchases all of its fuel from Al Turi and is contractually obligated to do so. This demonstrates a dependent relationship between Ameresco and Al Turi that did not exist between Maplewood and INGENCO. The differences in these two factors distinguish the Maplewood determination from the Al Turi determination.

As discussed previously, a single source determination for Title V and NSR applicability purposes consists of a three factor test. Two sources must be under common control, contiguous or adjacent and have the same two-digit SIC code, in order to be deemed a single source. Based upon this determination Al Turi and Ameresco are under common

control, are adjacent and have the same two-digit SIC Code. As a result, Al Turi and Ameresco are a single source for Title V and NSR applicability purposes.

**(2) The landfill gas control scenario presented in the proposed permit does not reflect the existing controls with the result that the proposed permit does not include all applicable Federal requirements.**

Based on information provided by Al Turi Landfill in its May 2004 Application for a Title V Permit Modification and by DEC in its draft Mod 2 permit, the public comment period for which began June 7, 2004, the control scenario used in the original and the proposed Mod 1 permits for Al Turi Landfill is believed to be inaccurate. The most recent information reflects the following: (1) a treatment system receiving untreated gas; (2) 2 back-up flares using untreated gas; and (3) 8 or 9 engines that use treated gas--2 of the engines serve as compressors in the treatment system and 6 or 7 of the engines generate electricity. The proposed Mod 1 permit does not mention the treatment system or the use of treated gas in the engines. Since, according to the Application, the system is in use already, it is appropriate to object at this time to this feature of the proposed permit. Consequently, in addition to all requirements for enclosed flares, the permit must include all requirements for a treatment system, which may comply with the NMOC emissions standard by use of open flares, enclosed combustors, and/or other control systems designed to reduce NMOC by 98%. While this may appear to be a reversal relative to the instructions of the Order and the Notice to Reopen, it is, rather, a response to the information now gleaned from the May 2004 Application and the draft Mod 2 permit.

Among the conditions affected by this altered scenario are Conditions 1-3, 1-5, and 52.

- a. Condition 1-3, which replaces original permit Condition 50, cites 208.8(f)--the reporting requirements for an active collection system--but omits language of 208.8(f) that is relevant to open flares and to enclosed combustors that are not enclosed flares, and it omits the requirement to submit an initial performance test report within 180 days of start-up of the collection and control system. The following language must be returned to the permit: "The initial annual report shall be submitted within 180 days of installation and start-up of the collection and control system, and shall include the initial performance test report required under 40 C.F.R. Part 60.8. For enclosed combustion devices and flares, reportable exceedances are defined under 6 N.Y.C.R.R. Part 208.9(c)." The controls for a treatment system may be open flares, enclosed combustors, or another type of control system designed to reduce NMOC by 98 weight percent. The Landfill must submit information to DEC per 208.7(d) for monitoring operation of the treatment system, including performance testing protocol, parameters to be monitored, and the ranges of those parameters that will reflect operation in compliance with the requirements. This addition is equivalent to returning the original permit Condition 49, "Monitoring of Operations- Other Control Devices," to the permit.

A condition to address the 208.9(c) recordkeeping requirement should be added, as well.

- b. Condition 1-5, which replaces original permit Condition 48, cites 208.7(b)--the monitoring of operations requirement for control using an enclosed combustor--and states the following: (i) there are 8 internal combustion engines and 2 enclosed flares owned and operated by Ameresco; (ii) the parameters to be monitored are temperature using a continuous-recording device and flow to or by-pass of the control device; and (iii) Ameresco LFG-1 Inc. will calibrate, maintain, and operate the monitoring devices while Al Turi Landfill is responsible for maintaining and submitting records of all data pertinent to these devices. Our objection to this condition is as follows:
- (I) Al Turi Landfill is responsible for all aspects of compliance with the Part 208 regulation. This includes calibrating, maintaining, and operating the monitoring equipment, not only maintaining and submitting records of all pertinent data.
  - (ii) The parameters to be monitored in this condition are suitable for monitoring of the enclosed flares, but not for the other control devices that are or may be used for NMOC control. The Al Turi Landfill permit must address emissions from atmospheric vents in the landfill gas treatment system and restrict the treated gas to subsequent sale or use, disallowing release to the environment. The options for controlling treatment system emissions are provided at 208.3(b)(2)(iii)(C)--use of open flares or a control system designed to reduce NMOC by 98 weight percent, or, when an enclosed combustion device is used for control, to either reduce NMOC by 98 weight percent or reduce the outlet NMOC concentration to less than 20 parts per million by volume, dry basis as hexane at 3 percent oxygen.
  - (iii) Condition 52 was not revised as directed in the Notice to Reopen. It omits the part of the 208.9(b) recordkeeping requirement that applies to enclosed combustors such as the enclosed flares used for control by Al Turi Landfill. This condition no longer needs to accommodate modified requirements for the engines since they have been reclassified as using treated landfill gas and thus are not subject to the NMOC control requirements for landfill gas control devices.

**(3) The proposed permit does not reflect the responsibility of Al Turi Landfill for compliance with all requirements for control of the landfill gas with the result that all applicable Federal requirements have not been addressed.**

The proposed Mod 1 permit either has not addressed issues raised in Issue I of the Notice to Reopen, or has done so incompletely. The Issue I instruction was to add language to existing permit conditions or create new conditions to address requirements from all of the (1) standards for air emissions from MSW landfills, (2) operational standards, (3) test methods and procedures, (4) compliance provisions, (5) monitoring requirements, (6) reporting requirements, and (7) recordkeeping requirements that apply to landfill gas controls; and to supplement the changes listed as necessary to address all requirements implied by the changes. Specifically, the conditions listed in Issue I that have not been corrected are Conditions 30, 31, 32, 39, 40, 43, 44, 48 (replaced by Condition 1-5), and 52; and the requirements that were to be added per Issue I that have not been added are 6 N.Y.C.R.R. 208.8(d), 208.8(e), 208.8(g), and 208.9(c). Correct these for a single source and the existing control system per the single source determination made by EPA and the control scenario revision delineated in Issues 1 and 2 above.

**(4) The proposed permit does not include all MACT requirements.**

According to the Description section at the front of the permit, Condition 1-6 was added to address requirements in 40 C.F.R. 63 Subpart AAAA, the National Emission Standard for Hazardous Air Pollutants: Municipal Solid Waste Landfills (the NESHAP for MSW Landfills, also known as the Maximum Achievable Control Technology standard, or MACT standard). Condition 1-6 cites 40 C.F.R. 63.1955(b) and incorporates some, but not all of the requirements of the MACT standard. The other Federal Applicable requirement that must be included for the MACT standard is found at 40 C.F.R. 63.1980(a). In Condition 1-3, the permit incorrectly mixes the requirements of 6 N.Y.C.R.R. 208.8(f) and 40 C.F.R. 63.1980(a), and cites 208.8(f) as the Federal Applicable requirement. The two requirements are the same but for the 6-month reporting interval in 63.1980(a) versus the 1-year reporting interval in 208.8(f). Since title V permits must include all applicable Federal requirements, both requirements must be included in the permit. The Applicable Federal Requirement for Condition 1-3 as written is to 40 C.F.R. 63.1980(a) and the requirement for 208.8(f) must be added.

**(5) The Permit Review Report does not include sufficient information about options regarding oxygen concentrations and monitoring at the collection system wellheads.**

References to an option to operate a gas collection system well at a higher oxygen concentration (original permit Condition 36 replaced by Condition 1-4) and to monitoring for nitrogen at the wellheads (original permit Condition 35 expired) were removed from the permit, but not explained to the extent delineated in the composite list of Order and Reopening Notice issues

sent to David Shaw, DEC, on February 25, 2004. The following are the outstanding elements of that instruction to be included in the Permit Review Report:

- a. Explain the option and process for approval and use of an owner's or operator's "higher operating value demonstration" for a particular well instead of the current "Upper Permit Limit" for compliance purposes.
- b. Explain the process for revising the permit to reflect the change in the "Upper Permit Limit."
- c. Furthermore, add to the Permit Review Report the following language that was present in original permit Condition 36, but absent from the proposed Mod 1 permit and Permit Review Report: "A higher operating value demonstration shall show supporting data that the elevated parameter does not cause fires or significantly inhibit anaerobic decomposition by killing methanogens." Remove from the Permit Review Report the following statement, found in the Applicability Discussion, Facility Specific Requirements section under 6 N.Y.C.R.R. § 208.4(c), but not a part of that requirement: "By measuring oxygen content, an operator can ascertain the effectiveness of collecting gas from the landfill mass."

**(6) The proposed permit does not fully meet the annual certification requirements of § 114(a)(3) of the Act and 40 C.F.R. § 70.6(c)(5) as items in the "Notification of General Permittee Obligations" section which appear under the heading "Federally Enforceable Conditions" are not subject to annual certification.**

In a letter from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, EPA, Region 2, dated November 16, 2001, DEC writes:

The Department understands that with respect to the requirement that all terms and conditions have to be certified annually, such a requirement does not mandate that a permittee certify to terms and conditions that do not create an obligation on the permittee (e.g., terms providing for the duration of a permit). On a case-by-case basis the Department may exclude from the certification terms that do not create an obligation on the permittee. . . . The Department can deal with these general permit provisions differently from provisions that relate to emissions and monitoring, but will still obtain certification of compliance with these general provisions. (emphasis added)

Conditions A through CC of the Al Turi Landfill permit contain items which are not subject to annual certification. While EPA does not object to a permitting authority's inclusion of a list of general advisory items that do not require certification, DEC was required to work with EPA to identify which items in Conditions A through CC are purely advisory in nature and are not obligations of the permittee.

EPA has engaged DEC in communications regarding this issue without resolution. It is EPA's belief that the following six conditions listed under the heading "Notification of General Permittee Obligations" either require annual certification or can be removed from the permit on a case-by-case basis if they are not applicable to the subject facility. EPA does not believe that certification of these terms would create an excessive burden on facilities.

- Condition C. Maintenance of Equipment
- Condition F. Recycling and Salvage
- Condition G. Prohibition of Reintroduction of Collected Contaminants to the Air
- Condition I. Proof of Eligibility for Sources Defined as Exempt Activities
- Condition Z. Visible Emissions Limited
- Condition AA. Open Fires

EPA does, however, agree that the following ten conditions are not obligations of the permittee and do not require certification:

- Condition E. Emergency Defense
- Condition H. Public Access to Recordkeeping for Title V Facilities
- Condition N. Permit Revocation, Modification, Reopening, Reissuance or Termination, and Associated Information Submission Requirements
- Condition P. Cessation or Reduction of Permitted Activity Not a Defense
- Condition Q. Property Rights
- Condition T. Severability
- Condition W. Permit Shield
- Condition X. Reopening for Cause
- Condition BB. Permit Exclusion
- Condition CC. Federally Enforceable Requirements

The remaining items included under the "Notification of General Permittee Obligations" require additional discussions between EPA and DEC to determine whether these items (a) are purely advisory in nature and do not need to be certified, (b) require annual certification, or (c) can be certified based upon readily available information (e.g., no evidence indicating non-compliance).

In the Order responding to *In the Matter of Al Turi Landfill, Inc.*, Petition No. II -2002-13-A (January 30, 2004), the Administrator granted the petition filed by the New York Public Interest Research Group as to Conditions C and G. The following two items further address Conditions C and G, Conditions 3 and 7, respectively, in the original permit.

a. Condition C- Maintenance of Equipment

Condition C states that the facility must maintain its control equipment. The Order stated that Al Turi must explain how Condition C applies to Al Turi Landfill, since the control

equipment is located at Ameresco. Although required to do so, Mod 1 did not explain applicability. This will no longer be an issue when the permit is modified so that the collection and control system is in one permit.

b. Condition G - Prohibition of Reintroduction of Collected Contaminants to the Outside Air:

Condition G states that air contaminants should not be allowed to be released to the outside air. The Order stated that DEC needed to clarify in the Al Turi Landfill permit or the Permit Review Report how this requirement applied to Al Turi Landfill. Although required to do so, Mod 1 did not explain applicability. This will no longer be an issue when the permit is modified so that the collection and control system is in one permit.

**(7) The proposed permit does not include the "excuse" provision that is in New York's SIP approved by EPA at 6 N.Y.C.R.R. § 201.5(e).**

An excuse provision (somewhat different from that which the DEC has included in the State side of the permit) is applicable to approved SIP requirements, 40 C.F.R. § 52.1679. This SIP-approved excuse provision differs from the provision in the current New York regulations because it does not cover violations due to shutdowns or during upsets. DEC should add the SIP version of the excuse provision to the Federal/State side of the permit and either (a) footnote the condition or (b) provide an explanation in the Permit Review Report that this requirement has been replaced by 6 N.Y.C.R.R. § 201-1.4 and is no longer State-enforceable. The explanation can refer the reader to the final permit condition which is located on the State-only side of the permit and contains the State-adopted version of the excuse provision.

**(8) In conjunction with the permit revisions indicated by the Issues above, the permit and Permit Review Report are to be revised as follows:**

- a. Add Items A through CC, Notification of General Permittee Obligations, to the "Page Location of Conditions, Federally Enforceable Conditions" at the front of the permit.
- b. Provide consistent descriptions throughout the permit and the Permit Review Report of the number of engines associated with the facility. The proposed Mod 1 permit Condition 30 indicates 9 engines; Condition 1-5, 8 engines; the Permit Review Report, 8 engines. The May 2004 Application for a permit modification indicates 9 engines.
- c. As directed in the Notice to Reopen, explain the emissions listed for Condition 59. The condition has been modified but not renumbered. It now includes a Process End Date: 3/24/2004. The emissions were "fugitive landfill gas emissions beyond the collection efficiency of the gas collection system" in the amounts of 1235 and 1903 million cubic feet per year. Explain this change in the Permit Review Report.

- d. Clarify and reconcile statements in the Permit Review Report and in proposed Mod 1 permit Condition 55 regarding landfill capacity, cover, waste acceptance, and collection and control system completion status. This information was requested in the Notice to Reopen with the footnote that gas must be collected and controlled from waste in place 2 years or more in an inactive landfill and 5 years or more in an active landfill. The Permit Review Report states that the landfill is at capacity with an expired solid waste permit, a Part 360 or equivalent cap installed over the entire "landfill proper," and a Landfill Gas Recovery System design and layout approved September 23, 1997, with updates approved annually by DEC. Condition 55 refers to "progression of final waste deposition," 10% of the landfill as "remaining operational," approximately 90% of the "operational landfill" as having a Part 360 final cover system in place, and 90% of the "landfill area" as being equipped with a collection and control system based on a November 1991 Master Plan.

In conjunction with addressing these Issues, DEC is herein directed to request the startup, shutdown, and malfunction plan (SSM plan) from Al Turi Landfill per 40 C.F.R. 63.6(e)(3); assure that the plan is revised, if necessary, to fulfill the requirements for Al Turi Landfill operating as a source that includes the landfill gas controls required by Part 208; and provide a copy of the plan to EPA.

K



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

**APR 27 2009**

Peter H. Zeliff  
Innovative Energy Systems Inc.  
2999 Judge Road  
Oakfield, NY 14125-9771

Re: Prevention of Significant Deterioration (PSD) - New Major Stationary Source 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; DEC ID: 6225200018

Dear Mr. Zeliff:

The Region 2 Office of the U.S. Environmental Protection Agency (EPA) has reviewed the March 18, 2009 Prevention of Significant Deterioration (PSD) air permit application for a proposed major stationary source. The proposed project consists of an electricity generation capacity expansion project from 4.8 MW to 8 MW that will include the addition of two (2) identical internal combustion (IC) landfill gas engines. Also, the applicant proposes to increase the allowable carbon monoxide (CO) hourly emissions limits for their three (3) permitted internal combustion landfill gas engines. Additional equipment included in the air permit application is an open flare for landfill gas combustion. After review, it has been determined that the application is incomplete. In order to continue processing your application, EPA will need the additional information requested below.

**Single "Stationary Source" under Prevention of Significant Deterioration (PSD) regulations**

The PSD regulations at 40 CFR 52.21 (b) (5) and (6) define a stationary source as "... all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)...Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972 , as amended by the 1977 supplement..."

As Innovative/DANC, LLC, is located on DANC Solid Waste Management Facility (DANC SWMF) property (leased land), the two facilities are located on "adjacent or contiguous properties." Also, based on the information supplied with your application and the information contained in the DANC SWMF title V Permit (Permit ID 6-2252-00007/00015, Renewal

Number 1), the two facilities belong to the same "Major Group." Consequently, if Innovative/DANC and DANC SWMF are under common control, they would constitute a single source for the purposes of PSD.

The fact that Innovative/DANC is located on property owned by DANC SWMF creates a presumption of common control.<sup>1</sup> Your application states, "The engines are fueled exclusively with landfill gas generated by and received from DANC Solid Waste Management Facility (natural gas is not, and will not be, used to fuel the internal combustion engines operations)." This dependency supports the presumption of common control. We have not seen any information in your application that overcomes the presumption that the gas-to-energy operation and the landfill are under common control.

The information before us leads to the belief that the facilities permitted as Innovative DANC (Permittee: Innovative/DANC LLC) and DANC Solid Waste Management Facility (Permittee: Development Authority of the North Country) are to be treated as a single source for the purposes of permitting under the PSD, non-attainment New Source Review (NSR), and title V programs of the Clean Air Act. Therefore, please revise your PSD Air Permit Application to include all pollutant-emitting activities of the landfill and the gas-to-energy operations currently permitted as separate sources. Please be sure to include the air contaminant emissions associated with the uncollected landfill gas, and all air contaminants emitted by any sources existing at these facilities that currently are considered "exempt" or "trivial sources." In order to facilitate the inclusion of all the information needed concerning the landfill gas generation rate, emissions from uncollected gas, and landfill gas combustion at the landfill, we encourage you to contact us as you prepare additional materials for your revised application. For example, if you plan to subtract any portion of the placed waste as non-biodegradable, sufficient documentation must be provided. If the landfill is operated with leachate recirculation or another method for promoting faster degradation of the landfilled waste, then that information should be included for consideration when estimating the landfill gas generation rate. We will use the information to arrive at a facilitywide potential-to-emit for the source before and after the modification.

### **Best Available Control Technology (BACT)**

Since the carbon monoxide (CO) potential emissions from the Innovative project constitute a major source by itself, this project triggers a major PSD review. For this project a BACT determination is required for nitrogen oxides (NOx), carbon monoxides(CO), sulfur dioxide (SO2) and particulates (PM 10 and PM 2.5) as they are the only pollutants with emissions above the significant thresholds. However, Innovative's BACT analysis does not address SO2 emissions even though the SO2 potential to emit from the proposed project (five internal combustion engines and one landfill gas open flare) of 45.2 tons per year exceed the significant PSD threshold of 40 tons per year.

It is EPA's position that the applicant has not performed an appropriate Best Available Control Technology (BACT) analysis for this proposed project. Specifically, Innovative/DANC neither

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<sup>1</sup> Note that, while common ownership constitutes common control, a common control relationship may be established in the absence of common ownership.

selected the most effective available means for minimizing their air pollutant emissions of NOx, CO, PM 10 and PM 2.5 nor sufficiently demonstrated why the most stringent technology should not be adopted. Furthermore, the applicant has failed to conduct a BACT analysis for SO2 even though the project causes significant SO2 emission increases.

#### Discussion on BACT for IC landfill gas engines

The NOx, CO, PM10 and PM 2.5 emission limits proposed by Innovative as Best Available Control Technology (BACT) for their five IC landfill gas engines are based solely on the emission limits of air contaminants that have been established for Caterpillar G3520C IC landfill gas engines. These are the same engines as those proposed for operation at the facility, and that are currently in operation at similar landfill gas to energy facilities. Lower emission limits, and the use of add-on controls such as selective catalytic reduction (SCR) and oxidation catalyst, were deemed infeasible by Innovative simply because of the presence of siloxanes in the landfill gas. As stated in the application, the siloxanes can damage the engine and may cause increases in emissions, especially carbon monoxide emissions. As well, the siloxanes foul the surface of the catalyst causing failure of the add-on controls. Additionally, Innovative's determination for not proposing add-on controls for their landfill gas engines was justified on the fact that none of the similar projects posted on US EPA BACT/LAER Clearinghouse have add-on controls.

#### Discussion on BACT for the landfill gas open flare

The NOx, CO, PM 10 and PM 2.5 emission limits proposed by Innovative as Best Available Control Technology (BACT) for their open flare are based exclusively on the information found on the US EPA BACT/LAER Clearinghouse for open and enclosed flares. However, Innovative has neither selected the most stringent emissions limitations contained in the US EPA database for their flare, nor provided an adequate justification why the most stringent limits have not been proposed.

#### EPA's Conclusions regarding BACT

EPA does not agree that Innovative's NOx, CO, PM10 and PM2.5 emission limits represent BACT for their landfill gas engines and landfill gas flare. Moreover, EPA does not agree that the BACT analysis should only consider the emissions from engine's manufacturer, type, and model, which are identical with those proposed in the project (e.g., IC Engine CAT 3520 C). Based on EPA's Draft New Source Review Workshop Manual (October, 1990), the BACT analysis should be based on "source category" rather than on certain equipment's manufacturer, make & model number. In addition, EPA believes that since siloxane removal technologies are commercially available, and have been employed in removing siloxanes from landfill gas, lower NOx, CO, PM 10 and PM 2.5 emission and the use of add on controls are feasible.

In further support of our opinion we attach examples with air permits and stack data issued for similar source categories (landfill gas engines and flares) that contain lower emission limits than those proposed by Innovative (Enclosure 1). In addition, we attach examples of landfill gas to energy projects employing the siloxanes removal technologies (Enclosure 2).

In conclusion, please provide a more thorough BACT analysis following the "top-down approach" as it is described in EPA's Draft New Source Review Workshop Manual (October 1990). The BACT analysis should include, but not be limited to, the following:

1. BACT analysis for SO<sub>2</sub> emissions from both landfill gas engines and flare.
2. Siloxanes content of the raw landfill gas (based on actual sampling).
3. Efficiency and cost of different siloxanes removal technologies.
4. The engine and add-on control (SCR and oxidation catalyst) manufacturer-specified siloxanes level requirement in the landfill gas prior to the engine and add-on control.
5. Cost of add-on controls (SCR and oxidation catalyst).
6. Please justify why an enclosed flare is not being proposed by Innovative for this project.
7. NO<sub>x</sub>, CO, PM<sub>10</sub>, and PM 2.5 emission limits for the IC landfill gas fired engines at the levels comparable with the best emission limits in the "source category" or provide further justification for not proposing the most stringent limit.
8. NO<sub>x</sub>, CO, PM 10 and PM 2.5 emission limits for the flare at the levels comparable with the best emission limits in the "source category" or provide further justification for not proposing the most stringent limit.

## **Other Issues**

### Landfill Gas Heating Value.

- Please explain why Innovative did not use the actual (measured) landfill gas heating value of 491 BTU/SCF for the engines and flare emission calculations, but a lower heating value of 350 BTU/SCF was used instead.
- Is there a difference between the heating values of the landfill gas used for engines than for the landfill gas combusted by the flare? If not, please use the same landfill gas heating value and methane content for both engines and flare emission calculations.

### Characterization of DANC's landfill gas

- Please clarify what "methane rich gas" means. What is the methane content that makes DANC's landfill gas "methane-rich gas".

### Fuel usage, heating value and air contaminants emission calculations

- The air contaminant emission rates calculations were based exclusively on a maximum landfill gas consumption rate of 719 SCFM/engine and a minimum landfill gas lower heating value of 350 BTU/SCF. However, for the same landfill gas usage rate (SCFM/engine) and higher landfill gas heating values, the engine's brake horse power hour (BHP), the emission factors (g/BHP-hr) of air pollutants, and respectively the emission rates may increase significantly. Please explain how you propose to ensure that the heating value of the landfill gas used for the engines will not exceed 350 BTU/SCF. Please be as specific as possible.

### NMOC and VOC

- Are the NMOC and VOC (ppm) concentrations in the landfill gas sent to the engines different from the concentrations in the gas sent to the flare? If not, please use the same NMOC and VOC (ppm) concentrations for both engines and flare emission calculations.

### Maximum Landfill Gas Usage Rate ( SCFM/each engine)

- The maximum landfill gas fuel usage rate of 719 SCFM/engine at 350 BTU/SCF heating value of landfill gas exceeds the Engine's Manufacturer maximum fuel rate for the same fuel heating value. Please provide the engine's manufacturer guarantee that the emission factors will remain the same for a higher fuel consumption rate.

### Start up and Shut down periods

- Please provide the duration (minutes) of each start up and shut down event. Also please specify the number of start up and shut down events /year /engine.
- Please provide the engine manufacturer's emission factors for the start up and shut down periods.

### Condensable Particulate matter (CPM)

- EPA recognizes that pursuant to 40 CFR 52.21 (b) (50) (vi) condensable particulate matter need not be accounted for in the applicability determinations until "On or after January 1, 2011 (or any earlier date established in the upcoming rulemaking codifying test methods)...". However, on March 25, 2009, US EPA published a proposed rule to revise two test methods for measuring particulate matter (PM) including condensable (CPM) from stationary source. The rule is currently under public comment until May 26, 2009. If the rule is adopted as proposed, the transition period for condensable particulate matter could end within 60 to 90 days after the promulgation of the test methods. Accordingly, if the CPM rule is adopted before a permit decision is reached, there may be potential delays in issuing the permit as the new CPM rule's provisions would have to be incorporated into your PSD permit. For that reason, EPA believes that it would be in your best interest if the condensable particulate matter would be addressed at this time in the PSD Applicability Determination for the proposed project.

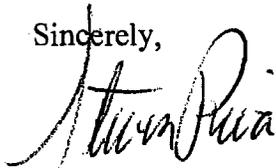
### **Air Quality Analysis**

- In response to your request to be waived from the preconstruction ambient air monitoring requirements, we agree that you may be waived from these requirements for CO, NO<sub>2</sub> and SO<sub>2</sub> since the modeled impacts provided thus far are less than the monitoring de minimis levels as specified in 40 CFR 52.21. Regarding, PM<sub>10</sub> the impacts are greater than the monitoring de minimis levels. EPA does not currently have final monitoring de minimis levels for PM<sub>2.5</sub>. Therefore, you may not be waived from these requirements for PM<sub>10</sub> and PM<sub>2.5</sub>. To address this, you propose to obtain data from two existing sites in St. Lawrence County. We understand this data is being collected on tribal lands and uploaded to the AQS (formerly AIRS) data base. In order for us to accept this data, we would need the following information:

1. EPA guidance recommends that 3 years of current of data is necessary. The data proposed is current. But, for the annual averages you provided data only for 2007. If there is more data at these locations it should be supplemented. We understand that the 2008 data may just have been added. If 3 years of data is not available, it may be necessary to supplement the data with data collected at other representative locations.
  2. Information regarding data capture and data quality should be included with the request to use these sites.
- Under a U.S. and Canada agreement, we must notify Canada of any air permit applications for sources located within 100 km of the border. Please find the enclosed form (Enclosure 3), which should be filled out and sent back to EPA Region 2 so that we may notify the proper officials.
  - It is not sufficient to claim that the existing enclosed landfill flare will not operate frequently. Impacts from the enclosed flare must be assessed unless the flare will be decommissioned.
  - The size of the SIA needs to be corrected from 1.0 km to 2.7 km on page 2 of the modeling section.
  - The XL files contained on the CD with the modeling analysis should be labeled and include a readme file that describes the contents.

If you have any questions related to our comments on the air quality analysis, please contact Ms. Annamaria Coulter at (212) 637-4016. For questions concerning all other comments in this letter, please contact Ms. Viorica Petriman at (212) 637-4021.

Sincerely,



Steven C. Riva, Chief  
Permitting Section  
Air Programs Branch

Enclosure(s):

1. Landfill gas IC engines and flares– NOx, CO, PM10 and PM 2.5 emission limits and stack test results.
2. Landfill gas to energy projects and siloxanes removal technologies.
3. U.S./Canada Agreement Notification form

cc: Lawrence R. Ambeau  
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Leon Sedefian, NYSDEC Albany Office

**ENCLOSURE 1**

**Table 1. Landfill gas IC engines – NOx, CO, PM 10 emission limits and stack test results**

Facility	Number & Type of Engines	NOx		CO		PM10		Siloxane Removal System Yes/No
		Allowable	Stack test	Allowable	Stack test	Allowable	Stack test	
Ameresco Half Moon Bay, LLC, CA	Six(6)GE Jenbacher , 2677 BHP/each	0.15 g/BHP-hr (SCR) BACT	-	0.52 g/BHP-hr (Oxidation Catalyst) BACT	-	0.1 g/BHP-hr	-	Yes
Warren County Landfill, NJ	Two(2) GE Jenbacher, 2677 BHP/each	0.53 g/BHP-hr Mfg Guarantee SOTA	0.42 g/BHP-hr	2.1 g/BHP-hr Mfg Guarantee SOTA	1.4 g/BHP-hr 1.9 g/BHP-hr	0.2 g/BHP-hr (TSP/PM10)	0.08 g/BHP-hr 0.06 g/BHP-hr (TSP)	No
Atlantic County Landfill Energy, NJ	Two (2) GE Jenbacher 2677 BHP/each	0.53 g/BHP-hr Mfg Guarantee SOTA <sup>1</sup>	0.48 g/BHP-hr	2.1 g/BHP-hr Mfg Guarantee NJDEP-SOTA <sup>1</sup>	1.96 g/BHP-hr	0.17 g/BHP-hr (TSP/ PM-10)	0.06 g/BHP-hr (TSP)	No
Ameresco-Keller Canyon, CA	Two(2) GE Jenbacher, 2677 BHP/each	0.6 g/BHP-hr Mfg Guarantee	-	2.1 g/BHP-hr Mfg Guarantee	-	0.1g/BHP-hr Mfg guarantee	-	Yes
PPL Renewable Energy, VT	Two(2) Caterpillar G3520C LE, 2233 BHP/each (3)	0.5 g/BHP-hr	-	2.75 g/BHP-hr	-	0.2 g/BHP-hr	-	No
Sonoma County , CA	Two(2) Caterpillar 3516 SITA, 1138 BHP/each	0.8 g/BHP-hr Mfg Guarantee LAER	-	2.1 g/BHP-hr	-	0.1 g/BHP-hr	-	No

**Innovative/DANC, LLC Landfill Gas Engines – NOX, CO, PM 10 Existing and Proposed Emission Limits**

Innovative/DANC (Mod 1)	Three(3) Caterpillar G3520C, 2233 BHP/each	0.60 g/BHP-hr	0.35 g/BHP-hr	3 g/BHP-hr	2.4 g/BHP-hr			No
Innovative/DANC PENDING	Five(3) Caterpillar G3250C, 2233 BHP/each	0.60 g/BHP-hr BACT	-	3.3 g/BHP-hr BACT	-	0.24 g/BHP-hr (PM-10) -BACT 0.14 g/BHP-hr (PM2.5)-BACT		No

<sup>1</sup>SOTA – New Jersey Department of Environmental Protection, State of the Art Manual for Engines

**ENCLOSURE 1 (continued)**

**Table 2. Landfill Gas Flares: NO<sub>x</sub>, CO and Particulate emissions limits and stack test results**

Facility	Number & Type of Flares	NO <sub>x</sub>		CO		PM10	
		Allowable	Stack test	Allowable	Stack test	Allowable	Stack test
Bureau of Sanitation City of Los Angeles, CA	Seven(7)Enclosed Flares 35 MMBTU/hr /each	0.06 lb/MMBTU BACT	0.045 lb/MMBTU	0.01 lb/MMBTU BACT	0.008 lb/MMBTU	6.1 lb/ MMSCF (PM) BACT	4.79 lb/MMSCF (PM)
Waste Management New Hampshire, NH	One(1) Enclosed Flare John Zinc, 115.5 MMBTU/hr	0.025 lb/MMBTU BACT	0.014 lb/MMBTU	0.06 lb/MMBTU BACT	0.013 lb/MMBTU	-	-
Rhode Island Resource Recovery ,LLC RI	One(1) Enclosed Flare John Zinc 201 MMBTU/hr	0.025 lb/MMBTU BACT	0.01 lb/MMBTU	0.06 lb/MMBTU BACT	0.00017 lb/MMBTU	-	-
<b>Innovative/DANC, LLC Landfill Gas Flare – NO<sub>x</sub>, CO, PM 10 Proposed Emission Limits</b>							
Innovative/ Danc	One(1) Open Flare John Zinc 38.9 MMBTU/hr	0.068 lb/MMBTU BACT	-	0.37 lb/MMBTU BACT	-	10 lb.MMSCF PM10/PM2.5 BACT	-

## ENCLOSURE 2

### Landfill gas to energy projects & siloxanes removal technologies

1. Ameresco Keller Canyon, LLC, CA
  - Two(2) GE Jenbacher landfill gas fired engines, 2677 BHP/each (operational 2008)
  - Siloxanes removal system: Temperature swing absorption gas cleaning system( TSA)
2. Ameresco Half Moon Bay, LLC, CA(experimental)
  - Six(6) GE Jenbacher landfill gas fired engines, 2677 BHP/each
  - Siloxanes removal system: Temperature swing absorption gas cleaning system( TSA)
  - Add on controls after the engines: Selective Catalytic Reduction and Oxidation Catalyst
3. Ameresco Jefferson City, LLC, Missouri
  - Three (3) Jenbacher landfill gas engines, 1470 BHP/each( operational)
  - Siloxanes removal system: activated carbon
4. Greenville Gas Producers, LLC – South Carolina
  - Two (2) Caterpillar G3520 landfill gas fired engines; 1600 kW/each(operational 2008)
  - Siloxanes removal technology is a GC GC Environmental, Inc
5. Belgium, Europe
  - Two(2) Deutz landfill Gas fired engines: 1200 kW and 3200 kW (operational 2003)
  - Siloxanes removal system consists of :AFT- Activated Graphite SAG <sup>TM</sup>
6. Calabasas Landfill –Sanitation Districts of Los Angeles County – South Coast Air Quality Management CA
  - Ten (10) 30 kW Capstone C30 landfill gas fire microturbines(operational 2002)
  - Siloxanes removal system: two stainless steel vessels containing activated carbon in series
7. Rhode Island Central Genco, RI (pending permit)
  - Five(5) Solar Taurus 60 landfill –gas fired combustion turbines, 6 MW/each
  - Siloxane removal system: activated carbon
  - Add on controls: Selective Catalytic Reduction(SCR)

### Enclosure 3

Notification Information per the 1995 US-Canada Air Quality Agreement

#### Requested Information

1. Name of facility
2. Location (city, county, state, zip code, etc.)
3. Distance from the US/Canada border (km/miles)
4. Type and size of facility (e.g., 400 MW utility)
5. Source of emissions (e.g., boiler, turbine, municipal waste combustor)
6. Type of fuel (e.g., coal, natural gas, fuel oil, wood)
7. Type and quantity of emissions (e.g., NOx - 800 tpy, 182.7 lbs/hr)
8. Emission control technology
9. Date permit application received
10. Stack height and diameter
11. Permit agency's contact name, address and telephone number (and email, if available)

For more details on the US-Canada Air Quality Agreement, including the Articles relating to the notification see  
<http://www.epa.gov/airmarkets/usca/>