STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of ONTARIO COUNTY for modification of the Part 360 permit, the Title V permit, and a request for a Part 663 freshwater wetlands permit for its municipal solid waste landfill on Route 5 & 20 in the Town of Seneca, Ontario County, New York.

(DEC Permit Application Nos.: 8-3244-00004/00007, 00001, and 00021)

ATTORNEY AFFIRMATION

AFFIRMATION OF THOMAS S. WEST, ESQ. IN SUPPORT OF MOTION TO PRECLUDE

THOMAS S. WEST, ESQ., duly affirms subject to the penalties of perjury pursuant to Rule 2106 of the New York Civil Practice Law and Rules ("CPLR"):

1. I am an attorney admitted to practice law in the State of New York and am personally familiar with the underlying facts, circumstances, legal arguments, and commentary from all parties relative to the above-referenced proceeding as more fully described below. I make this affirmation in support of Ontario County's Motion to Preclude two issues from being adjudicated in this proceeding, and I do so as a member of The West Firm, PLLC, which serves as co-counsel to Ontario County ("County") and as counsel to Casella Waste Services of Ontario, LLC ("Casella"), in these proceedings. The County owns the Ontario County landfill (the "County Landfill" or "Landfill"), and Casella operates the Landfill on behalf of the County.

2. My personal familiarity with the facts and circumstances relevant to this proceeding and this motion is based upon my experience with the environmental statutes, rules, regulations and program policies generally, including but not limited to those pertaining to the permitting of

solid waste management facilities in the State of New York. These include, without limitation, Environmental Conservation Law ("ECL") Article 27, Title 7; Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR Part 360"); ECL Article 19 and 6 NYCRR Part 200 et seq.; and the Program Policies of the New York State Department of Environmental Conservation (the "DEC" or "Department") relative to permitting landfills. I am also familiar with the general practices of the Department through more than three decades of practice before the Department.

3. My familiarity with the statutes, rules and regulations and the practices of the Department pertinent to solid waste management facilities is based upon my representation of a large number of clients during the course of my practice in New York State, including Casella Waste Systems, Inc. and its subsidiaries, as well as other clients that are engaged in the operation of solid waste management facilities. From the course of my representation of Casella and other landfill operators over the several decades (including in this proceeding), I have personal knowledge of all legal matters relative to the County Landfill, including, but not limited to, all aspects, both substantive and procedural, of the permit modification application at issue here, which seeks approval to construct and operate the Stage VIII and Stage IX Expansion and associated support facilities at the Landfill (hereinafter, the "Permit Modification").

4. In addition to my experience with the permitting of solid waste management facilities, such as the County Landfill, through my general practice of environmental law for more than three decades in New York, I am also personally familiar with the Department's regulations and uniform procedures, including, without limitation, those respecting the adjudicatory hearing process governed by 6 NYCRR Part 624.

5. I have also been personally involved representing Casella and the County in connection with this Permit Modification, including preparation and submission of the application to the Department in October 2013, and participation in conferences among the parties and the ALJ in January 2015, after the matter was referred to the Office of Hearing and Mediation Services for a legislative hearing and issues conference.

6. Accordingly, based on my personal knowledge and experience with the issues raised in this proceeding, I submit this Affirmation in support of the County's Motion to Preclude (1) issues related to the County's Solid Waste Management Plan ("SWMP"); and (2) matters pertaining to the common control rule of the U.S. Environmental Protection Agency ("EPA"), which issues are more thoroughly described below. For the reasons that follow, and as set forth in the accompanying Memorandum of Law dated February 27, 2015, these issues should be dismissed as a matter of law without the need to go through the standard issue identification and adjudication process contemplated by 6 NYCRR Part 624.

BACKGROUND

7. On February 25, 2014, a petition for party status pursuant to 6 NYCRR Part 624 (the "Petition") was filed on behalf of Finger Lakes Zero Waste Coalition (the "Coalition"), which raises three proposed issues for adjudication, and briefs two of the issues.[1] The two issues currently before this tribunal are as follows:

> "That the County cannot comply with the following applicable requirements:
>
> 1. The requirement to submit a comprehensive analysis and plan of action to achieve recycling goals identified in the County's approved plan, including but not limited to the requirement to adopt and enforce

[1] The third issue, relating to noise, must be filed by March 10, 2015.

local laws to facilitate implementation of plans to achieve progressively increased recycling rates." Alleging 6 NYCRR §§ 360-1.9(f), 360-15.9.

2. "Emission controls under Parts 360, 201, 202, 208 and 231, and the federal Clean Air Act and regulations either implemented by these Parts or applicable independently." Alleging 40 C.F.R. §§ 50, 52."

See Petition at p. 8.

8. This motion is intended to preclude consideration of these issues for adjudication as a matter of law. As set forth below and in the County's accompanying memorandum of law, the SWMP issues are not properly before this tribunal because they amount to a challenge either of (1) the Department's completeness determination relative to the Permit Modification application, which is plainly not adjudicable (6 NYCRR 624.4[c][7]), or (2) are a substantive challenge to the Department-approved SWMP, which is not a subject of this Permit Modification proceeding and is time-barred in any event. The Coalition's collateral attack on the issue of common control should not be considered because the Coalition had a full and fair opportunity to litigate this issue previously, and they are otherwise collaterally estopped.

THE COUNTY'S SWMP

9. The Ontario County SWMP was approved by Ontario County in June of 2014 and officially approved by the Department on July 7, 2014. Although the Coalition made a number of objections to the SWMP, they did not bring any proceeding to challenge the SWMP. Rather, through regulatory sophistry, they seek to collaterally attack the SWMP in this proceeding.

10. Relying on Part 360-1.9(f), the Coalition maintains that (1) a comprehensive recycling analysis ("CRA") is a prerequisite to approval to expand the landfill, and (2) because the County

did not prepare a separate CRA, the permit application cannot be approved. *See* Petition, at 9-16. The Coalition also maintains that even if the local SWMP could, theoretically, satisfy the CRA requirement, the substance of the County's SWMP does not. *See id.,* at 16-26.

11. For these reasons, the Coalition argues that the Part 360 Application for the permit modification is "deficient," and the SWMP is substantively defective and that defect precludes permit issuance.

12. Beyond the Coalition's being in error on the law, neither argument is a proper subject for consideration in this Permit Modification proceeding.

13. Regarding the alleged "deficient" Part 360 application, this is a veiled (but transparent) way of claiming that the Permit Modification is incomplete, and completeness is plainly not adjudicable. *See* County Memorandum of Law, Point IA; 6 NYCRR 624.4(c)(7).

14. Contrary to the Coalition's claim, 6 NYCRR 360-1.9(f) requires applicants for "initial" permits or "renewal" permits to submit a CRA (or have a local SWMP in effect that contains all the components of a CRA analysis); but this regulation does not apply to applications for permit modifications. And, in fact, the Coalition admits that this is a permit modification proceeding. Petition, at 1, 9. Thus, Section 360-1.9(f) is not applicable here. *See* County Memorandum of Law, Point IA, at 7-8.

15. In actuality, the Coalition's claim of application "deficiency" is a challenge to the Department's determination that the County's Permit Modification application was complete, and this is demonstrated by Section 360-1.8(g). *See* County Memorandum of Law, Point IA, at 9.

16. Under Section 360-1.8, the Department could not deem the County's application complete until the County had in effect a SWMP containing all the elements of both ECL 27-

0107(1) and Section 360-15. Section 360-15.9(f) contains all of the CRA elements set forth in Section 360-1.9(f)(1)-(7). Thus, in determining that the County's application was complete, the Department necessarily determined that the County's SWMP had an adequate CRA. Therefore, the Coalition's claim that the application is "deficient" because it lacks a CRA is a direct attack on the Department's completeness determination. As noted, completeness is never adjudicable. 6 NYCRR 624.4(c)(7). *See* County Memorandum of Law, Point IA, at 7. Therefore, this putative issue is not properly before this tribunal.

17. To the extent the Coalition's contentions can be viewed individually as attacks on the substance of the SWMP, they, too, are not properly before this tribunal; and, in any event, even if the Coalition were proceeding in the correct forum (which they are not), these claims are time-barred. *See* County Memorandum of Law, Point IB & C.

18. First, the adequacy of components in the SWMP are not germane to this Permit Modification proceeding. At issue in this proceeding is whether the County can meet the statutory and regulatory requirements that apply to the Permit Modification application. The adequacy of the SWMP is not tied to any permitting standard for the Permit Modification and, thus, by definition, cannot be a substantive and significant issue. In other words, this tribunal lacks subject matter jurisdiction over these issues in this proceeding. *See* County Memorandum of Law, Point IB.

19. Any challenge to the adequacy of the SWMP should have, and could have, been brought before the Supreme Court, whether after the County's adoption of the SWMP or after the Department's approval of it. *See* County Memorandum of Law, Point IC.

20. It is undisputed that the SWMP was prepared, reviewed and adopted by the County, and then approved by the Department. The Legislature for the County held a public hearing on the

proposed SWMP on April 17, 2014, and continued that hearing into its May 8, 2014, meeting. This was followed by the issuance of a negative declaration by Resolution No. 296-2014, which is attached hereto as **Exhibit A.**

21. The SWMP was adopted at the County Legislature's meeting on June 19, 2014. A copy of the resolution reflecting this adoption and the procedure followed by the County to adopt the SWMP, Resolution No. 297-2014, is attached hereto as **Exhibit B.**

22. The Department approved the adopted SWMP and issued a letter dated July 7, 2014, stating that the SWMP "contains a substantive consideration of the elements set forth in Section 27-0107.1 of the New York State Environmental Conservation Law (ECL) and is hereby approved with respect to those elements of the ECL . . . ." A copy of this letter is attached hereto as **Exhibit C.**

23. Any challenge to the SWMP should have been brought by commencing an Article 78 proceeding before the Supreme Court, within four months of the challenged determination. Here, this means a challenge to the County's adoption of the SWMP had to be filed no later than mid-October of 2014, and a challenge to the Department's approval of the SWMP had to be filed no later than early November 2014.

24. Accordingly, the Coalition's complaints are long time-barred (even if they were in the right forum, which they are not). *See* County Memorandum of Law, Point IC.

25. In effect, the Coalition is attempting to use this Permit Modification proceeding to do an "end run" around the expired statute of limitations and collaterally attack the Department's approval of the SWMP. This is improper, and, accordingly, the Coalition's allegations of deficiencies in the SWMP cannot be heard in this proceeding. *See* County Memorandum of Law, Point ID.

26. However, it bears mention that even were this tribunal to consider the merits of these claims, the Coalition would fare no better. The assertions in the Petition, including by way of example, that the SWMP does not contain "a comprehensive recycling analysis for the planning unit, including those items identified in subdivision 360-1.9(f) of this Part," are plainly disingenuous. *See* Petition, at 18.

27. The relevant regulation, 6 NYCRR 360-1.9(f), contains seven main requirements for a comprehensive recycling analysis. These relate to identifying the amount of recyclables that exist, an evaluation of the existing efforts to collect those recyclables, identifying possible markets for recovered recyclables, identifying proposed separation and recovery programs for the recyclables, methods to implement the recovery plan, a legal and institutional analysis, and a discussion of possible future actions to further the State's solid waste management policy. *See* 6 NYCRR 360-1.9(f).

28. The approved SWMP amply covers these topics. *See* SWMP, *available at* http://www.co.ontario.ny.us/index.aspx?NID=926 (containing SWMP as approved, SWMP Appendices A-L, and DEC's July 7, 2014 approval letter).[2] Identification of the amount of recyclables that exist is covered in SWMP Chapters 4, 6 and 7 and Appendices A, B, C, D, F, G, H and I. An evaluation of the existing efforts to recover recyclables is contained in SWMP Chapters 3, 4, 6 and 7 as well as in Appendices A, B, C, D, F, G, H and I. Identification of possible markets for recovered recyclables is included in SWMP Chapters 3, 4, 6 and 7, and in Appendices A, B, C, D, F, G, H and I.

29. Additionally, the SWMP discusses proposed separation and recovery programs, and the reasons for selecting the County's proposed program, in SWMP Chapters 3, 4, 5, 6 and 7. The

[2] A hard copy of the SWMP and its appendices will be provided to the Administrative Law Judge to ensure a full record is compiled for this proceeding should any judicial review be necessary. However, to minimize the size of this submission, reference to the electronic copy, only, is provided.

methods to implement the selected plan are described in SWMP Chapters 6 and 7 and Appendix I. A legal and institutional analysis is contained in SWMP Chapters 1, 2, 3, 6, 7 as well as Appendix J. Finally, a discussion of possible future actions to further the State's solid waste management policy is included in SWMP Chapters 1, 4, 5, 6, 7 and Appendix I.

30. Therefore, the Petition's claim that the SWMP is inadequate to satisfy the requirements of a CRA do not pass muster, and should not form any basis to deny this Motion to Preclude.

THE DEPARTMENT'S PRIOR COMMON CONTROL DETERMINATION

31. The Petition also seeks adjudication to determine "new emissions estimations" for the Landfill "before a Title V permit modification can be approved." *See* Petition at p. 26. The basis asserted by the Coalition for this proposed issue is that the Landfill, and the Landfill Gas to Energy Facility operated by Seneca Energy, II, LLC (the "LFGTE Facility"), which combusts a portion of the landfill gas generated by the Landfill, should be considered under "common control." The Petition asserts that such a finding would necessitate aggregation of the emissions from the Landfill and the LFGTE Facility and resultant Title V permit modifications for New Source Review ("NSR") and Prevention of Significant Deterioration ("PSD") requirements for both facilities.

32. The Coalition is, however, collaterally estopped from raising this issue in this proceeding, given its prior unsuccessful advocacy and litigation of this position in the permit modification proceeding for the LFGTE Facility. *See* County Memorandum of Law, Point II.

33. The same issue of common control relating to the Landfill and LFGTE Facility, specifically, has been thoroughly reviewed by the Department and decided adversely to the Coalition. From approximately 2009 to 2011, the Department performed a review of the facts relevant to a common control determination under Title V for these facilities. Based on its

review of information from the County, the LFGTE Facility operator and Casella, the Department issued a determination on January 5, 2012, finding that:

> Based on the available information from EPA and DEC, as well as additional information provided by Seneca Energy, Ontario County and Casella, it is this Department's finding for the New Source Review (NSR) and PSD purposes under 6NYCRR Part 231, Ontario County Landfill and Seneca Energy will continue to be treated as two separate facilities.

This determination is attached hereto as **Exhibit D.** The Coalition did not challenge this determination at that time.

34. A Title V permit modification application for the LFGTE Facility was submitted in January 2012, which sought to install and operate three additional Caterpillar G3520 landfill gas-fueled internal combustion engine generator sets. The Department determined that the application was complete in July, 2012, and published a Notice of Complete Application in the Department's Environmental Notice Bulletin on July 18, 2012 (the "Notice"). A copy of the Notice is attached hereto as **Exhibit E.**

35. The Notice provided that "the Department has generated a Draft Title V Facility Permit, and has made a tentative determination to send the Draft as a Proposed Permit to EPA for review, if comments received do not raise significant issues that must be addressed." *See* Exhibit E, at 10. A 30-day comment period was established, ending on August 17, 2012. *See id.*, at 13.

36. The Notice also advised that "DEC will evaluate the application and the comments received on it to determine whether to hold a public hearing. Comments and requests for a public hearing should be in writing and addressed to the Department representative listed below." *See id.*, at 12.

37. The Coalition submitted detailed comments regarding the LFGTE Facility's proposed Title V Permit modification (as well as comments relating to other issues) asserting, as they do in the Petition, that the Landfill and LFGTE Facility are under "common control" as defined by EPA, and, accordingly, the emissions from the two facilities should be aggregated and any necessary permit modifications should be made. A copy of the Coalition's August 17, 2012, comments to the LFGTE Facility permit modification application ("LFGTE Facility Comments") are attached hereto as **Exhibit F**.

38. The LFGTE Facility Comments included considerable detail regarding each factor related to a common control determination and also had virtually identical arguments to those set forth in the Petition. *See* Exh. F, at 2-6. In the LFGTE Facility Comments, the Coalition failed to request a hearing, issues conference, or adjudication of this issue, as it could have under the governing regulations, or as specifically advised by the Department in the Notice.

39. After review of the LFGTE Facility Comments, the Department issued a responsiveness summary addressing the Coalition's point-by-point analysis therein. The responsiveness summary found that common control did not exist for these two facilities and discussed in detail the facts supporting this conclusion. A copy of the September 11, 2012, Responsiveness Summary is attached hereto as **Exhibit G**. The Department also determined that no public hearing would be held for the LFGTE Facility permit modification. *See id.*, at 11.

40. The Department submitted the proposed Title V Permit to EPA with the Responsiveness Summary on that same date. *See* **Exhibit H**. EPA did not object within the 45-day review period. The Department, therefore, issued the LFGTE Facility's modified Title V permit, and the LFGTE Facility has been lawfully operating under that permit since its issuance.

41. However, as EPA failed to object to the proposed permit, the Coalition filed a Petition in December, 2012, pursuant to the Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d) requesting that the EPA object to the LFGTE Facility permit on the basis of common control. A copy of the Coalition Petition to the EPA (excluding its voluminous exhibits) is attached hereto as **Exhibit I** (hereinafter, the "EPA Petition"). In the EPA Petition, the Coalition provided extensive factual and legal discussion regarding its position on common control for the Landfill and the LFGTE Facility. These arguments both repeat and expand upon the arguments the Coalition presented to the Department in the LFGTE Facility Comments. *See* Exhs. F & I.

42. And the Coalition's efforts to litigate the common control issue in that forum did not stop there. The Coalition aggressively pursued a response from EPA, commencing an action in September, 2014, in the United States District Court for the Western District of New York seeking to compel a response to the EPA Petition. A copy of the complaint is attached hereto as **Exhibit J**. Subsequently, the Coalition and EPA reached a proposed settlement agreement, which would require EPA to respond to the EPA Petition objecting to the LFGTE Facility Title V Permit modification by June 30, 2015. *See* Petition, at 5 & n. 6.

43. Accordingly, it is abundantly clear that the Coalition is attempting to relitigate here the very same issue that was decided against it in the LFGTE Facility permit modification proceeding. *See* Exhibit G. And, indeed, the Coalition has admitted in its Petition that it raised the issue there and is awaiting the EPA's determination on the EPA Petition. Petition, at 5.

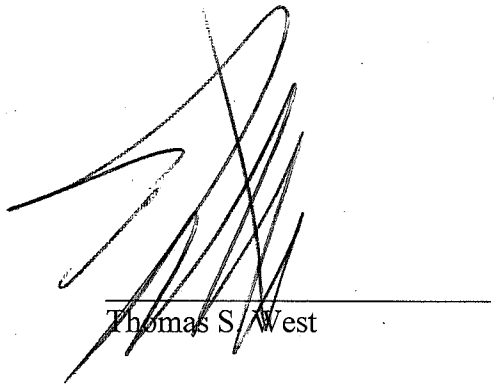
44. Importantly, as well, the County, Casella, and Seneca Energy II, LLC have confirmed that there have been no changes in the facts relied upon by the Department in determining that the facilities are not under common control. Attached as **Exhibit K** is the County's February 24, 2015, letter to DEC confirming this. Attached as **Exhibit L** is Casella's January 22, 2015 letter

to DEC confirming no changes. Finally, attached as **Exhibit M** is Seneca Energy's February 27, 2015, letter to DEC confirming the same.

45. Therefore, the common control issue the Coalition asserts here is identical to the issue necessarily decided against it in the LFGTE Facility permit proceeding. And, as demonstrated by the LFGTE Facility Comments and history pertaining to that proceeding, the Coalition had a full and fair opportunity to litigate the issue under the process and procedures accorded by 6 NYCRR Parts 621 and 624.

46. For all of these reasons, it is respectfully requested that this Motion to Preclude be granted in its entirety.

Dated: February 27, 2015
Albany, New York



Thomas S. West

EXHIBIT A

Ontario County

Board of Supervisors

Canandaigua, New York 14424

Supervisor Baker offered the following resolution and moved its adoption:

RESOLUTION NO. 296-2014
SEQR DETERMINATION OF SIGNIFICANCE FOR
ADOPTION OF THE ONTARIO COUNTY SOLID WASTE MANAGEMENT PLAN

WHEREAS, The County of Ontario is the planning unit responsible for developing a Solid Waste Management Plan (SWMP) pursuant to Section 27-0107, paragraph 1(a) of the Environmental Conservation Law of the State of New York; and

WHEREAS, On February 24, 2014 the New York State Department of Environmental Conservation issued a letter stating that the current draft of the SWMP constitutes an approvable plan; and

WHEREAS, The adoption of the SWMP constitutes an "Action" requiring review under the New York State Environmental Quality Review Act and its implementing regulations found at 6NYCRR Part 617 (hereinafter collectively referred to as SEQR); and

WHEREAS, A full Environmental Assessment Form (EAF) part I and Draft part II regarding the adoption of the SWMP has been prepared by the County Planning Department and submitted to this Board by the Environmental Quality Committee; and

WHEREAS, Resolution No. 164-2014 established the Ontario County Board of Supervisors as the lead agency to conduct an environmental review of said SWMP and classified the action as a Type I action under SEQR; and

WHEREAS, Said EAF was duly circulated to all involved and interested agencies; and

WHEREAS, The Ontario County Board of Supervisors duly advertised and held a public hearing to solicit public comments on said environmental review of the adoption of the SWMP; and

WHEREAS, Said public hearing was opened at 6:30 p.m. on April 17, 2014, then adjourned and reopened at 6:30 p.m. on May 8, 2014, before the Ontario County Board of Supervisors; and

WHEREAS, This Board has reviewed said EAF and all the information contained therein, the SWMP, comments received in writing, comments received at the Public Hearing, and the draft findings on file with the Clerk of this Board, and such other documents as this Board felt it necessary or appropriate to examine to adequately review the proposed Action supporting and/or supplementing the EAF; now, therefore, be it

RESOLUTION NO. 296-2014

RESOLVED, That the EAF part 1 and part 2 on file with the Clerk of this Board is hereby approved and adopted; and further

RESOLVED, That the findings statement on file with the Clerk of this Board is hereby adopted as the findings statement of this Board; and further:

RESOLVED, That this Board concludes that the objective of the SWMP is to reduce the amount of waste generated from within Ontario County that must be deposited in a landfill through a combination of reduction in generation of waste and diversion programs during the ten-year term of the plan, and that deposition of material in a Sanitary Landfill will continue while progress is made for those materials which cannot be diverted, reused, or recycled; and further

RESOLVED, That this Board hereby makes a negative declaration of significance for the adoption of the Ontario County Solid Waste Management Plan, stating that the Plan will not result in any significant adverse environmental impacts and that the impacts identified shall be mitigated to the extent practical; and further

RESOLVED, That the County Administrator be and hereby is authorized and empowered to complete the determination of significance section of said EAF, indicating that the proposed action will not result in any large and important impact(s) and, therefore, is one which will not have significant impact on the environment; and further

RESOLVED, That a Negative Declaration of Significance for this project be prepared by the County Planning Department and sent for Publication in the Environmental Notice Bulletin and sent to all involved and interested agencies; and further

RESOLVED, That this resolution take effect immediately.

STATE OF NEW YORK)
COUNTY OF ONTARIO)

I do hereby certify thot I have compared the preceding with the original thereof, on file in the Office of the Clerk of the Board of Supervisors at Canandaigua, New York, and that the same is a correct transcript therefrom and of the whole of said original; and that said original was duly adopted at a meeting of the Board of Supervisors of Ontario County held at Canandaigua, New York, on the 19th day of June, 2014.

Given under my hand and official seal June 20, 2014.

Karen R DeMay

Karen R. DeMay, Clerk
Board of Supervisors of Ontario County, NY

EXHIBIT B

Ontario County

Board of Supervisors

Canandaigua, New York 14424

Supervisor Baker offered the following resolution and moved its adoption:

RESOLUTION NO. 297-2014
ADOPTION OF THE ONTARIO COUNTY FINAL
SOLID WASTE MANAGEMENT PLAN 2014
AS AMENDED

WHEREAS, The County of Ontario is the planning unit responsible for developing a Solid Waste Management Plan (SWMP) pursuant to Section 27-0107, paragraph 1(a) of the Environmental Conservation Law of the State of New York; and

WHEREAS, On February 24, 2014, the New York State Department of Environmental Conservation issued a letter stating that the current draft of the SWMP constitutes an approvable plan; and

WHEREAS, Resolution No. 164-2014 established the Ontario County Board of Supervisors as the lead agency to conduct an environmental review of said SWMP; and

WHEREAS, The Ontario County Board of Supervisors duly advertised and held a public hearing to solicit public comments on said environmental review of the SWMP; and

WHEREAS, Said public hearing was opened at 6:30 p.m. on April 17, 2014, then adjourned and reopened at 6:30 p.m. on May 8, 2014; and

WHEREAS, Resolution No. 296-2014 made a Negative Determination of Significance in regard to the adoption of the SWMP pursuant to the State Environmental Quality Review Act and its implementing regulations found a 6 NYCRR Part 617; and

WHEREAS, Section 360-15.10 of the New York State Department of Environmental Conservation's solid waste management regulations contains several provisions that must be included in a planning unit's resolution to adopt a Final SWMP, and such clauses are included herein as required; now, therefore, be it

RESOLVED, That the Ontario County Final SWMP is hereby adopted by the Board of Supervisors, acting as the solid waste planning unit for Ontario County; and further

RESOLVED, That, as required by Sections 360-15.10, 360-15.11 and 360-15.12 of the New York State Department of Environmental Conservation's solid waste management regulations, the

RESOLUTION NO. 297-2014

County of Ontario will (i) evaluate and implement the solid waste management programs, projects and plans as identified in the Final SWMP, (ii) submit SWMP compliance reports to the New York State Department of Environmental Conservation every two years as required by Section 360-15.12, (iii) submit a SWMP modification to the New York State Department of Environmental Conservation when required by Section 360-15.11, and (iv) submit updates to the department-approved SWMP when required by the New York State Department of Environmental Conservation pursuant to Section 360-15.11; and further

RESOLVED, That the Director of the Ontario County Planning Department is hereby directed to send notices of the availability of the Final SWMP to adjacent solid waste planning units and will ensure that an electronic copy of the Final SWMP is made available for public review on the County's website; and further

RESOLVED, That the Director of the Ontario County Planning Department is hereby directed to furnish all items to the New York State Department of Environmental Conservation as indicated in the February 24, 2014, letter referenced above.

STATE OF NEW YORK }
COUNTY OF ONTARIO}

I do hereby certify that I have compared the preceding with the original thereof, on file in the Office of the Clerk of the Board of Supervisors at Canandaigua, New York, and that the same is a correct transcript therefrom and of the whole of said original; and that said original was duly adopted at a meeting of the Board of Supervisors of Ontario County held at Canandaigua, New York, on the 19th day of June, 2014.

Given under my hand and official seal June 20, 2014.

Karen R. DeMay, Clerk
Board of Supervisors of Ontario County, NY

EXHIBIT C

rec'd 1-11-17/mke

New York State Department of Environmental Conservation
Division of Materials Management
Office of the Director, 9th Floor
625 Broadway, Albany, New York 12233-7250
Phone: (518) 402-8651 • **Fax:** (518) 402-9024
Website: www.dec.ny.gov

Joe Martens
Commissioner

Mr. John E. Garvey, County Administrator
Ontario County
Ontario County Municipal Building
20 Ontario Street
Canandaigua, New York 14424-1806

JUL 07 2014

Dear Mr. Garvey:

Re: Ontario County's Local Solid Waste Management Plan

On June 30, 2014, the New York State Department of Environmental Conservation (Department) received for review and approval the Ontario County Final Local Solid Waste Management Plan. This local solid waste management plan was prepared by Ontario County and Barton & Loguidice, D.P.C. and adopted on June 19, 2014 by Resolution No. 297-2014 by the Ontario County Board of Supervisors.

Ontario County determined that an Environmental Impact Statement (EIS) was not necessary for the development and adoption of this local solid waste management plan. In this regard, the County issued a State Environmental Quality Review Negative Declaration dated May 29, 2014 in accordance with 6 NYCRR Section 617.10(d)(3).

We have determined that this Ontario County Final Local Solid Waste Management Plan contains a substantive consideration of the elements set forth in Section 27-0107.1 of the New York State Environmental Conservation Law (ECL) and is hereby approved with respect to those elements of the ECL for the planning period ending December 31, 2023.

Please note that any modifications to this approved local solid waste management plan must be submitted to this Department for prior approval, pursuant to 6 NYCRR Section 360-15.11. Furthermore, compliance report must be submitted to this Department pursuant to 6 NYCRR Section 15.12 by March 1 every two years beginning on March 1, 2015.

The key to effective solid waste management is proper planning. Planning and priorities must be carefully considered to assure limited resources are spent wisely on projects that establish rational, lasting foundations for environmentally-sound solid waste management at the local level.

If you have any questions regarding this matter, please call David Vitale of the Bureau of Permitting and Planning at (518) 402-8678.

Sincerely,

Salvatore Ervolina, P.E.
Director
Division of Materials Management

cc: P. D'Amato – NYSDEC Region 8 Regional Director
David Baker – Chairman, Environmental Quality Committee, Ontario County
Daryls McDonough – Deputy County Administrator, Ontario County
Thomas Harvey – Director of Planning, Ontario County
Luann Meyer – Barton & Loguidice

EXHIBIT D

file

New York State Department of Environmental Conservation
Division of Air Resources, Region 8
6274 East Avon-Lima Road, Avon, New York 14414-9516
Phone: (585) 226-2466 • **Fax:** (585) 226-2909
Website: www.dec.ny.gov

Joe Martens
Commissioner

January 5, 2012

Ms. Emily Zambuto
Environmental Analyst
Seneca Energy II, LLC
2999 Judge Road
Oakfield, NY 14125

Re: Ontario LF LFGTE Facility and
Ontario County Landfill
Major Source/Facility Determination

Dear Ms. Zambuto:

Based on the available information from EPA and DEC, as well as additional information provided by Seneca Energy, Ontario County and Casella, it is this Department's finding that for New Source Review (NSR) and PSD purposes under 6NYCRR Part 231, Ontario County Landfill and Seneca Energy will continue to be treated as two separate facilities.

Any modeling required for the NSR analysis and any BACT determinations should be based on this finding.

If you have any questions, please do not hesitate to contact Michele Kharroubi of my staff at (585) 226-5312.

Sincerely,

Thomas L. Marriott, P. E.
Regional Air Pollution Control Engineer

cc: Robert Stanton – NYSDEC/Albany
Michele Kharroubi – NYSDEC/Region 8
Paul D'Amato – NYSDEC/Region 8
Scott Sheeley – NYSDEC/Region 8

EXHIBIT E

ENB Region 8 Completed Applications 07/18/2012

Region 8 SEQR and Other Notices
Region 8 SPDES Renewals

Chemung County

Applicant:

Hurley Farms Inc
1543 Maple Ave
Elmira, NY 14904

Facility:

Hurley Pit
1543 Maple Ave
Southport, NY

Application ID:

8-0736-00109/00002

Permit(s) Applied for:

Article 23 Title 27 Mined Land Reclamation

Contact for this Page

ENB
NYS DEC
Division of Environmental Permits
625 Broadway, 4th Floor
Albany, NY 12233-1750
518-402-9167
Send us an email

This Page Covers

All of New York State

Project is Located:

Southport, Chemung County

Project Description:

The applicant proposes to continue mining within a prior-permitted sand and gravel pit on the Hurley property on Maple Avenue in the Town of Southport. The mine consists of a total of 87 acres within the Life of Mine (LOM) acreage and was previously permitted to David Bowers. The Department proposes to re-issue the same permit (now expired) to Hurley Farms, Inc. The mining operation remains unchanged and will involve the removal of approximately 6.9 million cubic yards of material over the operational life of the mine. The mine will operate as a traditional surface excavation of topsoil, sand, and gravel using mechanical equipment, standard for this type of mining operation. Materials will be mined from below the water table to a maximum depth of 50, feet using an excavator, front loader, or dragline as appropriate. If required, on-site processing may include dry screening with a portable screener at a rate not to exceed 150 tons per hour. Final reclamation will restore the site to open space and wildlife habitat to include emergent wetlands surrounding an open water pond. Upland reclamation will include the replacement of stockpiled topsoil, and reseeding with an approved USDA SCS seed mixture.

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is a Type I action and will not have a significant effect on the environment. A coordinated review with other agencies was performed and a Negative Declaration is on file.

SEQR Lead Agency: NYS Department of Environmental Conservation

State Historic Preservation Act (SHPA) Determination:

A cultural resources survey has been completed. The report of the survey is on file. No archaeological sites or historic structures were identified at the project location. No further review in accordance with SHPA is required.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 17, 2012.*

Contact:

Scott Sheeley
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Genesee County

Applicant:

Steve D Fox

Facility:

Branton Property
Roakoke Rd - E SIDE|1/2 Mi N of
Sweetland Rd
Stafford, NY

Application ID:

8-1844-00059/00001

Permit(s) Applied for:

Article 24 Freshwater Wetlands

Project is Located:

Stafford, Genesee County

Project Description:

Applicant proposes to remove woody debris and accumulated sediments throughout an approximately 3,200 linear foot reach of a Class C stream within and adjacent to State Freshwater Wetland ST-7 (Class 3) to restore positive drainage for agricultural fields and field tile systems, as as well as clear and maintain a 10-foot access trail for

future maintenance, requiring an Article 24 Freshwater Wetlands permit. Project includes work on two properties owned by Fox (DEC ID #8-1844-00060/00001) and Branton (DEC ID #8-1844-00059/00001).

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is not subject to SEQR because it is a Type II action.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

The proposed activity is not subject to review in accordance with SHPA. The permit type is exempt or the activity is being reviewed in accordance with federal historic preservation regulations.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 02, 2012.*

Contact:

Peggy Norry
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Applicant:

Steve D Fox

Facility:

Fox Property
9184 Bater Rd
Stafford, NY

Application ID:

8-1844-00060/00001

Permit(s) Applied for:

Article 24 Freshwater Wetlands

Project is Located:

Stafford, Genesee County

Project Description:

Applicant proposes to remove woody debris and accumulated sediments throughout an approximately 3,200 linear foot reach of a Class C stream within and adjacent to State Freshwater Wetland ST-7 (Class 3) to restore positive drainage for agricultural fields and field tile systems, as as well as clear

and maintain a 10-foot access trail for future maintenance, requiring an Article 24 Freshwater Wetlands permit. Project includes work on two properties owned by Fox (DEC ID #8-1844-00060/00001) and Branton (DEC ID #8-1844-00059/00001).

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is not subject to SEQR because it is a Type II action.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

The proposed activity is not subject to review in accordance with SHPA. The permit type is exempt or the activity is being reviewed in accordance with federal historic preservation regulations.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 02, 2012.*

Contact:

Peggy Norry
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Ontario County

Applicant:

Seneca Energy II LLC
2999 Judge Rd
Oakfield, NY 14125

Facility:

Ontario County Lfg to Energy Facility
3555 Post Farm RD|Ontario County Landfill
Stanley, NY 14561

Application ID:

8-3244-00040/00002

Permit(s) Applied for:

Article 19 Air Title V Facility

Project is Located:

Seneca, Ontario County

Project Description:

Seneca Energy II LLC has submitted an application for renewal and modification for expansion of its Title V Facility Permit

for its Ontario County Landfill Gas to Energy Facility, located at 3555 Post Farm Road in the Town of Seneca, which burns treated landfill gas for generation of electrical power.
Currently, eight 1190 horsepower, 16 cylinder, internal combustion generator sets produce 6.4 megawatts of electrical power for sale to the power grid.
In addition to re-authorization of current landfill gas to energy generating operations, Seneca Energy II LLC proposes to increase electrical generating capacity with the addition of three 2233 horsepower, 20 cylinder, internal combustion engine generator sets producing 1.6 megawatts of electrical power each, increasing current Landfill Gas to Energy Facility generating capacity from 6.4 to 11.2 megawatts. The landfill is currently producing more gas than the expanded 11.2 megawatt Landfill Gas to Energy Facility will consume, with the excess not used for power production being burned by landfill flares.
The facility is subject to the requirements of Part 201-6 (Title V) for Major Stationary Sources due to potential emissions of carbon monoxide (CO) and oxides of nitrogen (NO_X) in excess of 100 tons per year each.
As part of the application, Seneca Energy proposes to limit the increase in potential emissions of CO from the expansion of generating capacity to 206.6 tons per year, below the 250 ton per year threshold in 6 NYCRR Part

231-7: New Major Facilities and Modifications to Existing Non-Major Facilities in Attainment Areas (Prevention of Significant Deterioration). Seneca Energy also proposes to limit the increase in potential emissions of NO_X from the expansion of generating capacity to 64.6 tons per year, below the 100 ton per year threshold in 6 NYCRR Part 231-5: New Major Facilities And Modifications To Existing Non-Major Facilities In Nonattainment Areas, And Attainment Areas Of The State Within The Ozone Transport Region.

In response to the application, the Department has generated a Draft Title V Facility Permit, and has made a tentative determination to send the Draft as a Proposed Permit to EPA for review, if comments received do not raise significant issues that must be addressed.

The Draft Permit limits potential CO emissions after expansion to a maximum of 446.4 tons per year, a 206.6 ton per year increase from the current 239.8 ton per year emission potential. Conditions to ensure compliance specify calculation of monthly CO emissions from the engines, using daily individual production data based on the amount of electricity generated by each engine and the results from approved exhaust stack testing.

The Draft Permit also limits NO_X emissions after expansion to a maximum of 157.5 tons per year, a 64.6 ton per year increase from the current 92.9 ton

per year emission potential. Conditions to ensure compliance specify calculation of monthly NO_X emissions from the engines, also using daily individual production data based on the amount of electricity generated by each engine and the results from approved exhaust stack testing.

The Draft Permit also reflects that the Landfill Gas to Energy Facility is now subject to Part 227-2 NO_X Reasonably Available Control Technology (RACT) regulations, with potential emissions of NO_X over 100 tons per year. Emissions were restricted to below this threshold in the current Permit. Draft Permit conditions specify demonstration of compliance with the Part 227-4(f)(2) NO_X RACT standard of 2.0 grams per brake horsepower hour by monthly exhaust stack measurements, and specify corrective action if lower permitted emission factors of 1.05 grams for the existing engines and 1.0 gram for the new engines, based on the Part 231-5 annual NO_X limit above, are exceeded.

The application, Draft Permit, and Permit Review Report are available for review at the Region 8 NYSDEC office. The Draft Permit and Permit Review Report may be viewed or downloaded as .pdf files at:
http://www.dec.ny.gov/dardata/boss/afs/draft_atv.html
In accordance with 6NYCRR Parts 621.7 (b)(9) and 201-6.4(c), the Administrator of the United States Environmental Protection Agency (USEPA) has the

authority to bar issuance of any Title V Facility Permit if it is determined not to be in compliance with applicable requirements of the Clean Air Act or 6NYCRR Part 201.
Persons wishing to inspect the subject Title V files, including the application with all relevant supporting materials, the draft permit, and all other materials available to the DEC (the "permitting authority") that are relevant to this permitting decision should contact the DEC representative listed below. The Draft Permit and Permit Review Report may be viewed and printed from the Department web site at: http://www.dec.ny.gov/chemical/32249.html.
DEC will evaluate the application and the comments received on it to determine whether to hold a public hearing. Comments and requests for a public hearing should be in writing and addressed to the Department representative listed below. A copy of the Department's permit hearing procedures is available upon request or on the Department web site at: http://www.dec.ny.gov/permits/6234.html.

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an

appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

Cultural resource lists and map have been checked. No registered, eligible or inventoried archaeological sites or historic structures were identified at the project location. No further review in accordance with SHPA is required.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 17, 2012*.

Contact:

Roger T McDonough
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Steuben County

Applicant:

NYS Dept of Transportation
50 Wolf Rd
Albany, NY 12232

Facility:

St Rte 352 Bridge
St Rte 352 Aka Denison Pkwy W
Corning, NY

Application ID:

8-4603-00055/00001

Permit(s) Applied for:

Section 401 - Clean Water Act Water Quality Certification

Project is Located:

Corning, Steuben County

Project Description:

The NYS Department of Transportation is proposing to replace the existing 4-lane State Route 352 bridge over the Chemung River in its current alignment. Approximately 817 cubic yards of heavy stone rip rap will be installed along approximately 400 lineal feet of streambank and at the base of the bridge piers to provide scour protection. Additionally, two temporary causeways may need to be constructed to provide access to areas beyond reach of shore-based equipment. The causeways would be designed and constructed in a manner that maintains the necessary hydraulic channel capacity. An off-site

detour will be utilized to maintain traffic around the work area during construction. In addition to the 401 Water Quality Certification the project will require an Article 16 Flood Control Land Use permit from the Department.

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is not subject to SEQR because it is a Type II action.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

The proposed activity is not subject to review in accordance with SHPA. The permit type is exempt or the activity is being reviewed in accordance with federal historic preservation regulations.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 02, 2012*.

Contact:

Thomas P Haley
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Wayne County

Applicant:

Raymond J Brooks

Facility:

Brooks Property
3037 Lake Rd
Williamson, NY

Application ID:

8-5446-00095/00001

Permit(s) Applied for:

Article 15 Title 5 Excavation & Fill in Navigable Waters

Project is Located:

Williamson, Wayne County

Project Description:

The proposed project includes installing 215 linear feet (440 tons) of rock revetment using a barge mounted excavator. The revetment will consist of two rows of large (4 to 6 ton) quarried limestone rocks with the lower row being

installed approximately 6 inches below Mean High Water level.

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is an Unlisted Action and will not have a significant impact on the environment. A Negative Declaration is on file. A coordinated review was not performed.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

Cultural resource lists and map have been checked. No registered, eligible or inventoried archaeological sites or historic structures were identified at the project location. No further review in accordance with SHPA is required.

Coastal Management:

This project is located in a Coastal Management area and is subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 02, 2012*.

Contact:

Matthew Griffiths
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414
(585)226-2466
dep.r8@dec.ny.gov

Multiple Counties

Applicant:

NYS Electric & Gas Corp
18 Link Dr
PO Box 5224
Binghamton, NY 13902 -5224

Facility:

Keuka Hydro Project
Bradford Dam to Keuka Lake
Bradford to Barrington, NY

Application ID:

8-9908-00057/00007

Permit(s) Applied for:

Article 15 Title 5 Stream Disturbance
Section 401 - Clean Water Act Water Quality Certification

Project is Located:

Bradford, Multiple Counties

Project Description:

The applicant is proposing the removal of approximately 425 cubic yards of

accumulated sediment from an area 50 feet upstream and 50 feet downstream of the County Route 87 culvert. The dredged material will be dewatered and disposed of in a NYSDEC permitted Part 360 disposal facility.

Availability of Application Documents:

Filed application documents, and Department draft permits where applicable, are available for inspection during normal business hours at the address of the contact person. To ensure timely service at the time of inspection, it is recommended that an appointment be made with the contact person.

State Environmental Quality Review (SEQR) Determination:

Project is not subject to SEQR because it is a Type II action.

SEQR Lead Agency: None Designated

State Historic Preservation Act (SHPA) Determination:

The proposed activity is not subject to review in accordance with SHPA. The permit type is exempt or the activity is being reviewed in accordance with federal historic preservation regulations.

Coastal Management:

This project is not located in a Coastal Management area and is not subject to the Waterfront Revitalization and Coastal Resources Act.

Opportunity for Public Comment:

Comments on this project must be submitted in writing to the Contact Person no later than *Aug 02, 2012.*

Contact:

Thomas P Haley
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6274 E Avon-Lima Rd
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dep.r8@dec.ny.gov

Region 8 SEQR and Other Notices
Region 8 SPDES Renewals

EXHIBIT F

August 17, 2012

Roger T. McDonough
NYSDEC Region 8 Headquarters
6274 E Avon-Lima Rd
Avon, NY 14414

RE: Ontario County Lfg to Energy Facility, Article 19 Air Title V Facility, DEC Application ID # 8-3244-00040/00002

Dear Mr. McDonough,

I am writing on behalf of the Finger Lakes Zero Waste Coalition, Inc., to submit formal comments on Seneca Energy II LLC's application for renewal and modification for expansion of its Title V Facility Permit for its Ontario County Landfill Gas to Energy Facility, located at 3555 Post Farm Road in the Town of Seneca.

In response to comments solicited by the NYSDEC in the matter of the Title V Air Permit Renewal (DEC ID 8-3244-00040) submitted on January 9, 2012, by the Ontario County Landfill Gas to Energy Facility located at 3555 Post Farm Road, Stanley, NY and operated by Seneca Energy II, LLC, we have the following comments:

According to Declaratory Ruling 19-19: Seneca Meadows, Inc., issued by the New York State Department of Environmental Conservation (Department), Deputy Counsel, Alison H. Crocker, on September 9, 2011, the United State Environmental Protection Agency (EPA) Clean Air Act (CAA) provides that "permit issuing authorities are required to review Title V permit applications to determine, inter alia, whether two or more nominally separate facilities should be permitted as a single source of emissions." A single major source of emissions is described as one in which a group of stationary sources are located on adjacent or contiguous properties, belong to the same Major Group as described in the Standard Industrial Classification (SIC) Manual (1987) and are under "common control." The Environmental Conservation Law and the 6 NYCRR also provide for similar determinations of a major industrial grouping for the purposes of air emissions.

At this time, we object to the Department's determination that the Ontario County Landfill and the Ontario County Landfill Gas to Energy Facility are not considered a major source of emissions for the purposes of Prevention of Significant Deterioration (PSD) and New Source Review (NSR) programs. This objection is based on a review of documents and the Title V Permit renewal applications of the two facilities.

We submit that the applicants' facilities are located on contiguous parcels of land, which is owned and leased by Ontario County, N.Y. Both facilities share an SIC code of 49. In addition, we believe that they are, indeed, under "common control" as described in a communication by William Spratlin, Director, Air, RCRA and Toxics Division of the US Environmental Protection Agency, dated September 18, 1995.

In coming to a conclusion regarding common control, we have considered the questions brought forth by Mr. Spratlin, and subsequently reiterated by Raymond Werner, Chief, Air Programs Branch, and cited in the Department's Declaratory Ruling referenced above.

Using the questions provided by Mr. Spratlin, et al., we wish to provide you with the supporting documentation relating to the existence of a common control relationship between the parties.

1. Do the facilities share a common workforce?

   The facilities share a common workforce in that a Gas Assignment Agreement (GAA), dated May 8, 2002, between Ontario County and Innovative Energy Systems (IES) and later assigned to a subsidiary of IES, Seneca Energy II, LLC , under an Assignment and Assumption Agreement dated October 20, 2003, and the Lease Agreement (LA) between Ontario County and IES/Seneca Energy II dated May 8, 2002, provide for Seneca Energy's access to the landfill gas collection system, owned by Ontario County and leased by Casella Waste Systems, at time when the landfill is unmanned. This access also allows the personnel from Seneca Energy to repair the gas collection system. Additionally, the GAA allows for an inventory of equipment to be used for this purpose. (GAA, Article VI, (E), page 7). In addition, the Lease Agreement gives the Seneca Energy personnel unlimited access to "enter upon and use the landfill ", use the surface of the landfill for ingress and egress "at all reasonable times" and "in an emergency or as part of normal day-to-day operations." {Lease Agreement, page 3, (a) (i), (ii), (iii)}.

2. Do the facilities share equipment or pollution control equipment?

   As above, the facilities share equipment designated for emergency repair of the landfill gas collection system, which is owned and operated by Ontario County and Casella Waste Systems. Article VI, paragraph (E) of the GAA provides for this repair and sharing of equipment.

   In addition, although the GAA provides specific language in its third WHEREAS, stating that the "gas scrubbing system...owned by Assignee (Seneca Energy II) and incidental to the production of the electricity...." the Ontario County Landfill Annual Report for 2011 states that the condensate from the gas filtering, dewatering and compression system is not sampled because it is pumped back into the leachate collection system, which is owned and operated by Ontario County and Casella Waste Systems. (Ontario County Landfill Annual Report, 2011, page 22) The condensate from the Seneca Energy Landfill Gas to Energy Facility's pollution control system is thus directly connected to the others' system, and depends on it for disposal of the products of its

pollution control device. Should there be a problem with the leachate system, this would directly affect the disposal of the products of the others' pollution control system. Therefore, the parties are dependent on one another with respect to pollution control.

3. Can the managing entity of one facility make decisions that affect pollution control at the other facility?

   The managers of both facilities have the ability to affect pollution control at the others' facilities in the following ways:

   Seneca Energy, earlier this past winter of 2011-2012, adjusted the flow of the landfill gas to their facility, over which they have absolute control {GAA page 3 (C)} such that the gas flow overwhelmed the existing flare, creating a two month-long period of uncontrolled, fugitive emissions to the local towns, in both northwesterly and southeasterly directions. These emissions from the landfill gas collection system operated by Casella Waste were evidenced by the presence of extreme odors experienced and reported by residents from distances of up to 7 miles from the landfill. This event resulted in the approval of an additional temporary flare installation under the operation flexibility program. The landfill operator, Casella Waste, was forced to add approximately 13 new gas wells to the gas collection system in addition to the temporary flare. An additional effect of this increased gas flow to the Seneca Energy facility is also evidenced by the theoretical presence of the increased risk of fire in the waste mass due to air entrainment by the gas collection system under increased flows "absolutely regulated and controlled" by Seneca Energy II.

4. Do the facilities share common … activities …insurance coverage, or other administrative functions?

   The facilities share general liability insurance coverage. "…Assignee (Seneca Energy) shall also maintain comprehensive general liability insurance naming Assignor (Casella/Ontario County) as an additional insured." {GAA, Article VI, (H)}

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

   Seneca Energy is not allowed, according to the GAA, to purchase or combust any other gas unless the gas quality or quantity is poor, or it becomes no longer economically viable to combust landfill gas. "In the event that the gas produced at the Ontario Landfill is not of sufficient quantity or quality to meet Assignee's Requirements, then Assignee may, at its option, purchase or produce fuel to power the Electricity Project from whatever sources it deems appropriate to the extent, and only to the extent, that Assignor is unable to meet Assignee's requirements." {GAA, page 5, USE OF GAS; REVIEW} Thus, Seneca Energy is required to combust the landfill gas only, while it exists in

sufficient quantities and is of good quality. Since this landfill is expected to produce landfill gas for many years into the future, even if closed or shut down, Seneca Energy is not free to pursue other sources of gas for its project for many years into the future, the term being limited only by the longer of 10 years or until the project is no longer economically viable. (GAA, Article IX) Seneca Energy, then, is completely dependent upon Casella Waste/Ontario County for its product.

In 2011, the total landfill gas collected was 1,233,630,773 cubic feet. Total electricity generated was 52,942,990 K.W.H. One million, seven hundred forty-six thousand K.W.H. were used onsite. (Ontario County Landfill Annual Report, 2011, page 22). Through an Excess Gas Utilization Agreement (EGUA), entered into on December 31, 2007, between IES, Seneca Energy II, and Casella Waste Services of Ontario LLC, a subsidiary of Casella Waste Systems, and the successor to New England Waste Services of New York, LLC, Seneca Energy provides the Casella Waste administrative office building located on the property owned by Ontario County with excess, treated landfill gas, at no cost. The agreement states in its second WHEREAS, that Casella possesses the right to any landfill gas not utilized by Seneca Energy for its project. (EGUA, page 1). However, the agreement provides that the gas be treated by Seneca Energy II. "Seneca shall provide Casella of Ontario with a steady flow of up to 150 standard cubic feet per minute of Excess Gas from the Facility at no cost..." (EGUA, I. 1.1, page 1). This agreement evidences a relationship whereby Seneca Energy provides the service of treatment of landfill gas to Casella Waste at no cost to Casella. Since the gas is treated and provided at no cost, the relationship between the two parties appears to be one of mutual dependence.

Ontario County/Casella Waste has assigned exclusive rights to Seneca Energy II, to combust its landfill gas. "Assignor shall not assign or utilize or permit the utilization of the Gas in any manner except as set forth expressly herein." {Article II, (E), GAA, page 4). Thus, Ontario County/Casella is not free to pursue any other business interests relating to landfill gas, without the consent of Seneca Energy II.

6. Who accepts responsibility for compliance with air quality control requirements?

The three parties have maintained separate Title V Air Permits. However, as referenced above, Seneca Energy has the ability to affect the pollution control of Casella/Ontario County's landfill gas collection system. In addition, the Title V Permit application submitted by Seneca Energy II, states that "Pass through" biogenic CO2, or CO2 fraction in landfill gas that passes through the combustion process without changing form, is not counted towards total project emissions as this CO2 is already counted in the existing landfill PTE which the landfill is capable of accommodating and will emit this quantity of CO2 with or without the LFGTE project." (pages 8-9). This statement evidences that the emissions are also shared, and that the efficiency of the Seneca Energy engines have a bearing on the amount of "pass through" emissions from the landfill, i.e., the amount of CO2 counted as "landfill emissions" is affected by the destruction or lack of destruction

by the LFGTE facility. In addition, a statement which appears in the Ontario County Landfill Draft Environmental Impact Statement (1.- 1.1, paragraph 5, page l, November 22, 2011) states ,"Casella operates all landfill and support activities." This statement is not consistent with the parties' position on the common control issue.

The "reasonable business judgment of Seneca Energy is binding on the County. "Assignee will at all times operate the Electricity Project in substantial compliance with applicable environmental laws and regulations and will make a good faith effort to maximize the economic benefits of the electricity project for the benefit of both the Assignee and Assignor provided, however, that the Assignees (sic) reasonable business with respect to the Electricity Project's operation shall be binding upon the Assignor." {GAA, Article I, (A) page 3}. This statement evidences a common control relationship, in that the County/Casella is under the control of Seneca Energy's judgment with respect to the operation of the LFGTE facility.

It appears that no "common control" relationship questions have arisen until the present time of Title V permit renewal, at which they are subject to controls under the PSD/NSR programs. In order to avoid the decrease in emissions which they are subject to upon renewal of their current permits, they have become proactive with respect to attempts to deny this relationship. Because the Ontario County Landfill Title V Air Permit application has yet to be determined "complete" by the Department, it is recommended that the emissions summary and PTE summaries for both facilities be combined for purposes of PSD/NSR program controls, when that application is determined to be complete. When the emissions from the two facilities are combined, they will show that, due to the "common control" relationship of the parties, the facilities should be subject to emission limits prescribed by the Clean Air Act through the EPA.

7. 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?

This question has been addressed in the preceding paragraph #5.

8. Does one operation support the operation of the other? What are the financial arrangements between the two parties?

A Gas Purchase Agreement (GPA) entered into by the three parties, and dated January, 2008, explains the transfer of interest in economic incentives, such as tax credits from the County to Casella, to be shared equally between Seneca Energy and Casella. In addition, the GAA also provides for a 50-50 share between the parties in any tax credits (GAA, pg. 15). This sharing of economic incentives in an equal manner indicates that the parties share common control.

Schedule A (GAA, pg. 14-15) entitles the County to a 50% royalty for any electricity sold by Seneca Energy over $ .04 per kwh, with arrangements for cost-of-living increases.

Casella receives free treated gas from Seneca Energy as stipulated in the Excess Gas Utilization Agreement dated December 31, 2007. This free gas also indicates a common control relationship between the two parties.

In conclusion, we believe we have satisfied the requirements that evidence a "common control" relationship between the Ontario County Landfill, Casella Waste Systems and the Ontario County Landfill Gas to Energy Facility. In addition, we have provided the material facts of contiguous land parcels, and the sharing of the same two-digit SIC code. At this time we request that the two parties Title V Air Permits be combined as one industrial grouping for purposes of satisfying the control requirements under the Clean Air Act.

In the matter of the Title V Air permit application submitted by the Seneca Energy II, LLC, operator of the Ontario County Landfill Gas to Energy Facility, Title V permit ID: 8-2344-0004/0007, Noise Impact Assessment dated May, 2012, we have the following comments:

Re: 2.0 Existing Facility and Proposed Project Description

It is clear from this application that the Ontario County Landfill Gas to Energy Facility (OCLGTE) intends to expand its operations in conjunction with the expansion of the Ontario County Landfill expansion project, which is impermissible under SEQR. Please see the attached SEQR letter for Ontario County Landfill Expansion, Page 9, which references a Notice of Incomplete Application dated June 22, 2011, from the NYS Department of Environmental Conservation to Seneca Energy II, LLC requiring that the OCLGTE facility submit emissions reports from both the Ontario County Landfill and the OCLGTE facility in order to avoid impermissible segmentation. "To avoid impermissible SEQR segmentation, the emissions from landfill and LFGTE must be presented and evaluated in the DEIS as part of the SEQR action." The emissions from the landfill operations are not included in this application. In addition, it is clear from the preceding discussion on elements of "common control", that the expansion of the landfill, and the expansion of the LFGTE facility are directly linked. The statement that "Based on landfill gas model estimates, the existing landfill has the potential to generate sufficient quantities of landfill gas to supply the existing and proposed LFGTE facilities and the landfill gas generated from the expansion landfill is not required for LFGTE to operate." (SEQR letter, page 9). As discussed in the preceding sections, the LFGTE facility is contractually bound to combust the landfill's gas, unless the quantity or quality of gas is insufficient. We request that the landfill's emissions be included in this application.

Page two of the Noise Impact Assessment state that the proposed 3 Engine facility will consist of "Ancillary equipment that supports the proposed additional electricity generation operations. Please provide an itemized list of the ancillary equipment including silencers for the engines.

Seneca Energy also states that the proposed engines will be housed within a building, which "significantly attenuates engine noise." Please provide the engineering drawings of the proposed building. Please calculate the attenuation provided by the building.

Please provide details as to the construction and exact location of the soil berm which has "been constructed between the LFGTE facility and offsite receptors." Please provide calculations as to the attenuation provided by this berm.

Re: 3.1Sound Level Monitoring

Please provide a map with the exact locations of the monitoring locations which "included all (4) sides of the 8-engine facility."

Since monitoring was initiated "after landfill operational hours", on 4/30/12, and monitoring which was performed on a 7-engine facility in 2010 per the 2011 Ontario County Landfill Annual Report during operational hours, "(7:00 AM to 10:00 PM) please explain how the noise level is reported as 5 dBA louder when the landfill is not in operation. Assuming that the difference between the sound levels of the 3516IC engines is zero, the addition of one engine should have resulted in a sound level of 77.7 on the South side of the 8 -engine building. {DEC- Assessing and Mitigating Noise Impacts, 2001, page 8, (2).} The results of the testing on 4/30/12 indicated that the sound level is approximately 3 dBA higher than expected. This is especially concerning due to the reported lack of operations at the landfill at the time that the higher reading of 80.6 dBA occurred.

Re: 3.2 Results Summary

Table 1 presents the results of the 8-engine facility monitoring. Please provide a map with the exact locations of these measurement sites.

Re: 4.0 Proposed LFGTE Facility – Similar Facility Sound Levels

Table 3 fails to include a description of the building at the DANC facility where these measurements were performed. Please provide building measurements including the wall thicknesses, and distance of engines from the interior walls. Please provide a map of the locations at which all 4 measurements were done, with distances marked.

Re: 5.0 Noise Impact Assessment

Sound levels "were projected to the nearest offsite receptors." The Department's Assessing and Mitigating Noise Impacts, 2001, states "Solid Waste regulations require the measurement of sound levels be at the property line."{page 13, (b)}."The most conservative approach utilizes the property line." Please include "distances for each point of receptors, including the distance and the point in time when operations will be

closest to receptors," as per this policy and Part 360 regulations. Please provide the specific attenuation factors used in this assessment.

It should also be noted that a letter dated June 22, 2012, included with this packet, describes the addition of Silex JC-16 cylindrical silencers to the Caterpillar G3520C engines at the DANC facility. The explanation provided states that the difference between the rated sound levels of these engines based on a technical data sheet of 85 dBA (mechanical free field) and 86.1 dBA (exhaust free field) and the measured sound levels of the 3 engines is due to the addition of the silencers, and the attenuation provided by the DANC building.

With no attenuation and assuming a difference in sound levels between the 3 engines of zero, the three engines would have a sound level of 92 dBA. (See DEC Assessing and Mitigating Noise Impacts, 2001). One engine has a level of 86. Two engines would require the addition of 3 dBA, bring the total for 2 engines to 89 dBA. The addition of a third engine would require the addition of 3 dBA, bringing the total for 3 engines to 92 dBA. If each silencer provides a reduction of 30-38 dBA, as is stated in the letter, and the attenuation of the building is 15 dBA, as provided for in the Department's policy, {page 10, (4)} the measured sound levels for these 3 engines would be predicted at 47 dBA. Please provide an explanation of why the measured sound levels for these 3 engines is reported as 73.9 dBA.

Re: 5.1 Construction Noise Assessment

Please specify the operational hours and the expected duration of this project. Please provide a listing of equipment to be used, with the expected decibel levels of each piece of equipment, and their expected combined sound levels per the Department's policy. Please provide the details on the height and thickness of the soil berm, and the expected attenuation of this berm on sound levels during construction.

Thank you for the opportunity to comment on this application.

Sincerely

Douglas C Knipple, Ph. D.
President, Finger Lakes Zero Waste Coalition, Inc.

cc. David J. Shaw, Director, Division of Air Resources, NYSDEC, Albany
Ray Werner, Chief, Air Programs Branch, US EPA, Region 2
Steven Riva, Chief, Permitting Section, Air Programs Branch, US EPA, Region 2
Mary McHale, Office of Regional Counsel, US EPA Region 2

EXHIBIT G

Responsiveness Summary - Seneca Energy II LLC
Ontario County Landfill Gas to Energy Facility
Draft Renewed and Modified Title V Permit
DEC Application ID 8-3244-00040/00002

Prepared by
New York State Department of Environmental Conservation

Part 1. Identifies conditions in the Proposed Permit changed from the Draft Permit and indicates why they were changed.

Part 2. Indicates the procedure to petition the EPA to object to the issuance of the Proposed Permit.

Part 3. Is the Department's response to the Comments received during the Public Comment Period on the Draft Title V Facility Permit.

Part 1 - Proposed Permit: Changes from the Draft Permit.

Comments were received from Douglas C. Knipple, representing Finger Lakes Zero Waste Coalition Inc on August 17, 2012.

No changes were made to the Proposed Permit from the Draft Permit based on the comments received.

Part 2 - Procedure to petition the EPA to object to the issuance of the Proposed Permit.

The following procedures are from section 6NYCRR Part 201-6.4 (c) *EPA Objection* and (d) *Public Petitions to the Administrator*:

If the EPA does not object in writing during its 45 days allocated for the review of the Proposed Permit, any person may petition the Administrator within 60 days after the expiration of the EPA's 45-day review period to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the EPA objects to the permit as a result of a petition filed under this paragraph, the Department shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the Department has issued a permit prior to receipt of an EPA objection under this paragraph, the EPA will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in section 6.7(e) of this Subpart, except in unusual circumstances, and the Department may thereafter issue only a revised permit that satisfies EPA's objection.

Petitions should be sent to:
Lisa P. Jackson, Administrator
US Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington DC 20460

And a copy should be sent to:
Steven C. Riva, Chief
Permitting Section, Air Programs Branch
U.S. Environmental Protection Agency
290 Broadway, New York NY 10007-1866

Part 3 - Responses to Comments Received during the Public Comment Period.

Comment 1.

Do the facilities share a common workforce?

The facilities share a common workforce in that a Gas Assignment Agreement (GAA), dated May 8, 2002, between Ontario County and Innovative Energy Systems (IES) and later assigned to a subsidiary of IES, Seneca Energy II, LLC , under an Assignment and Assumption Agreement dated October 20, 2003, and the Lease Agreement (LA) between Ontario County and IES/Seneca Energy II dated May 8, 2002, provide for Seneca Energy's access to the landfill gas collection system, owned by Ontario County and leased by Casella Waste Systems, at time when the landfill is unmanned. This access also allows the personnel from Seneca Energy to repair the gas collection system.

Additionally, the GAA allows for an inventory of equipment to be used for this purpose. (GAA, Article VI, (E), page 7). In addition, the Lease Agreement gives the Seneca Energy personnel unlimited access to "enter upon and use the landfill ", use the surface of the landfill for ingress and egress "at all reasonable times" and "in an emergency or as part of normal day-to-day operations." {Lease Agreement, page 3, (a) (i), (ii), (iii)}.

Response:

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

As stated in Declaratory Ruling 19-19, the determination of whether two or more facilities are under common control is made on a case-by-case basis. In utilizing the case-by-case approach, Department staff may be guided by EPA's informal guidance documents and determination letters, such as the Spratlin guidance letter. As explained in the Declaratory Ruling, the questions set forth in the Spratlin letter should be utilized as a non-exhaustive "screening tool" to determine whether common control exists. As Spratlin explained, major indicators such as common ownership or common management may indicate the existence of a common control relationship, as well as a combination of several non-major indicators. However, there is no obligation to rely exclusively on any particular guidance document, simplifying test, or factor therein. The Department continues to utilize the case-by-case approach for common control determinations, taking into account EPA's numerous informal guidance documents and precedent.

Comment 2.

Do the facilities share equipment or pollution control equipment?

As above, the facilities share equipment designated for emergency repair of the landfill gas collection system, which is owned and operated by Ontario County and Casella Waste Systems. Article VI, paragraph (E) of the GAA provides for this repair and sharing of equipment.

In addition, although the GAA provides specific language in its third WHEREAS, stating that the "gas scrubbing system...owned by Assignee (Seneca Energy II) and incidental to the production of the electricity...." the Ontario County Landfill Annual Report for 2011 states that the condensate from the gas filtering, dewatering and compression system is not sampled because it is pumped back into the leachate collection system, which is owned and operated by Ontario County and Casella Waste Systems. (Ontario County Landfill Annual

Report, 2011, page 22) The condensate from the Seneca Energy Landfill Gas to Energy Facility's pollution control system is thus directly connected to the others' system, and depends on it for disposal of the products of its pollution control device. Should there be a problem with the leachate system, this would directly affect the disposal of the products of the others' pollution control system. Therefore, the parties are dependent on one another with respect to pollution control.

Response:

Casella, Seneca Energy and Ontario County do not share equipment or air pollution control equipment. Ontario County owns the landfill and Casella operates the landfill and the flares. Seneca Energy owns and operates the LFGTE facility gas combustion engines. Responsibility for pollution control as stated in the Gas Assignment Agreement (GAA) is the responsibility of each entity. One entity cannot make decisions regarding the operation of the others air pollution control equipment.

Ontario County/Casella does not treat the landfill gas prior to it being sold to Seneca Energy (who has gas conditioning equipment). However, if gas conditioning by Ontario County/Casella is needed in order to sell LFG to other parties or for other reasons, they are not prohibited from doing so. They would not be dependent on Seneca Energy for that service.

Comment 3.

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

The managers of both facilities have the ability to affect pollution control at the others' facilities in the following ways:

Seneca Energy, earlier this past winter of 2011-2012, adjusted the flow of the landfill gas to their facility, over which they have absolute control {GAA page 3 (C)} such that the gas flow overwhelmed the existing flare, creating a two month-long period of uncontrolled, fugitive emissions to the local towns, in both northwesterly and southeasterly directions. These emissions from the landfill gas collection system operated by Casella Waste were evidenced by the presence of extreme odors experienced and reported by residents from distances of up to 7 miles from the landfill. This event resulted in the approval of an additional temporary flare installation under the operation flexibility program. The landfill operator, Casella Waste, was forced to add approximately 13 new gas wells to the gas collection system in addition to the temporary flare. An additional effect of this increased gas flow to the Seneca Energy facility is also evidenced by the theoretical presence of the increased risk of fire in the waste mass due to air entrainment by the gas collection system under increased flows "absolutely regulated and controlled" by Seneca Energy II.

Response:

Seneca Energy is required to control the flow of gas entering their facility since their engines can only handle a set amount of gas (and as specified by the permit). Casella has the ability to flare any or all of the gas that the landfill generates. Since gas was being generated quicker than originally expected, a temporary flare was installed to control the odors generated. The area of the landfill that was generating the additional gas was not required by regulation to have gas collection because it was still accepting waste and the existing waste in place had not been there for the required 5 year period (specified in 40 CFR 60 Subpart WWW).
Casella Waste was not, by regulation or DEC order, "forced" to install new gas wells. They were installed as part of the mechanism needed to control odors from LFG generated sooner than originally expected. The additional gas could not be utilized by Seneca Energy since they did not have any permitted additional engine capacity.

Comment 4.

Do the facilities share common ... activities ...insurance coverage, or other administrative functions?

The facilities share general liability insurance coverage. "...Assignee (Seneca Energy) shall also maintain comprehensive general liability insurance naming Assignor (Casella/Ontario County) as an additional insured." {GAA, Article VI, (H)}

Response:

As stated in the December 22, 2011 letter from Casella, Seneca Energy and Casella do not share common payroll activities, employee benefits, health plans, retirement funds or other administrative functions. Having comprehensive general liability insurance, which names the Assignor (Ontario County) as an additional insured, does not indicate the sharing of administrative functions as set forth in EPA's "Spratlin" guidance letter or establish common control.

Comment 5.

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

Seneca Energy is not allowed, according to the GAA, to purchase or combust any other gas unless the gas quality or quantity is poor, or it becomes no longer economically viable to combust landfill gas. "In the event that the gas produced at the Ontario Landfill is not of sufficient quantity or quality to meet Assignee's Requirements, then Assignee may, at its option, purchase or produce fuel to power the Electricity Project from whatever sources it deems appropriate to the extent, and only to the extent, that Assignor is unable to meet Assignee's requirements." {GAA, page 5, USE OF GAS; REVIEW} Thus, Seneca Energy is required to combust the landfill gas only, while it exists in sufficient quantities and is of good quality. Since this landfill is expected to produce landfill gas for many years into the future, even if closed or shut down, Seneca Energy is not free to pursue other sources of gas for its project for many years into the future, the term being limited only by the longer of 10 years or until the project is no longer economically viable. (GAA, Article IX) Seneca Energy, then, is completely dependent upon Casella Waste/Ontario County for its product.

In 2011, the total landfill gas collected was 1,233,630,773 cubic feet. Total electricity generated was 52,942,990 K.W.H. One million, seven hundred forty-six thousand K.W.H. were used onsite. (Ontario County Landfill Annual Report, 2011, page 22). Through an Excess Gas Utilization Agreement (EGUA), entered into on December 31, 2007, between IES, Seneca Energy II, and Casella Waste Services of Ontario LLC, a subsidiary of Casella Waste Systems, and the successor to New England Waste Services of New York, LLC, Seneca Energy provides the Casella Waste administrative office building located on the property owned by Ontario County with excess, treated landfill gas, at no cost. The agreement states in its second WHEREAS, that Casella possesses the right to any landfill gas not utilized by Seneca Energy for its project. (EGUA, page 1). However, the agreement provides that the gas be treated by Seneca Energy II. "Seneca shall provide Casella of Ontario with a steady flow of up to 150 standard cubic feet per minute of Excess Gas from the Facility at no cost..." (EGUA, I. 1.1, page 1). This agreement evidences a relationship whereby Seneca Energy provides the service of treatment of landfill gas to Casella Waste at no cost to Casella. Since the gas is treated and provided at no cost, the relationship between the two parties appears to be one of mutual dependence.

Ontario County/Casella Waste has assigned exclusive rights to Seneca Energy II, to combust its landfill gas. "Assignor shall not assign or utilize or permit the utilization of the Gas in any manner except as set forth expressly herein." {Article II, (E), GAA, page 4). Thus, Ontario County/Casella is not free to pursue any other business interests relating to landfill gas, without the consent of Seneca Energy II.

Response:

Pursuant to Article I of the Gas Assignment Agreement (GAA), Ontario County "is hereby granted the right to regulate and absolutely control the flow of gas entering the Electricity Project, including discontinuing same at

any time if, in the reasonable opinion of Assignee, the gas adversely affects the operations of the Electricity Project or it is no longer economically viable to operate the Electricity Project with the gas."

Pursuant to Article II of the GAA "In the event that the gas produced at the Ontario (County) Landfill is not of sufficient quantity or quality to meet Assignee's (Seneca Energy) Requirements , then the Assignee (Seneca Energy) may, at its option, purchase or produce fuel to power the Electricity Project from whatever sources it deems appropriate...." Thus, the GAA gives Seneca Energy (SE) the right, but not the obligation to purchase the LFG. SE's engines can also run on natural gas. Since there is at least one natural gas pipeline within a reasonable distance of the energy plant, there is the ABILITY to hook up to those lines and purchase natural gas. However, the economics dictate at this time that LFG should be used.

Comment 6.

Who accepts responsibility for compliance with air quality control requirements?

The three parties have maintained separate Title V Air Permits. However, as referenced above, Seneca Energy has the ability to affect the pollution control of Casella/Ontario County's landfill gas collection system. In addition, the Title V Permit application submitted by Seneca Energy II, states that "Pass through" biogenic CO2, or CO2 fraction in landfill gas that passes through the combustion process without changing form, is not counted towards total project emissions as this CO2 is already counted in the existing landfill PTE which the landfill is capable of accommodating and will emit this quantity of CO2 with or without the LFGTE project." (pages 8-9). This statement evidences that the emissions are also shared, and that the efficiency of the Seneca Energy engines have a bearing on the amount of "pass through" emissions from the landfill, i.e., the amount of CO2 counted as "landfill emissions" is affected by the destruction or lack of destruction by the LFGTE facility. In addition, a statement which appears in the Ontario County Landfill Draft Environmental Impact Statement (1.- 1.1, paragraph 5, page I, November 22, 2011) states ,"Casella operates all landfill and support activities." This statement is not consistent with the parties' position on the common control issue.

Response:

The emission control equipment owned and operated by the County/Casella (flares) can handle all of the landfill gas, are permitted to do so and can operate independent of the energy plant if so desired. Casella currently has an economic incentive to send the gas to the energy plant rather than flaring the gas.
The act of putting the waste in the landfill creates the CO2 regardless of whether the energy plant is operational or not. The energy plant does not change the amount of CO2 created by the landfill.

Support activities include the activities supported by Ontario County at the landfill itself, not the energy plant. The energy plant is separately owned and operated and the landfill staff does not adjust the energy plant's engines.

Comment 6 (continued):

The "reasonable business judgment of Seneca Energy is binding on the County. "Assignee will at all times operate the Electricity Project in substantial compliance with applicable environmental laws and regulations and will make a good faith effort to maximize the economic benefits of the electricity project for the benefit of both the Assignee and Assignor provided, however, that the Assignees (sic) reasonable business with respect to the Electricity Project's operation shall be binding upon the Assignor." {GAA, Article I, (A) page 3}. This statement evidences a common control relationship, in that the County/Casella is under the control of Seneca Energy's judgment with respect to the operation of the LFGTE facility. It appears that no "common control" relationship questions have arisen until the present time of Title V permit renewal, at which they are subject to controls under the PSD/NSR programs. In order to avoid the decrease in emissions which they are subject to upon renewal of their current permits, they have become proactive with respect to attempts to deny this relationship. Because the Ontario County Landfill Title V Air Permit application has yet to be determined "complete" by the Department, it is recommended that the emissions summary and PTE summaries for both

facilities be combined for purposes of PSD/NSR program controls, when that application is determined to be complete. When the emissions from the two facilities are combined, they will show that, due to the "common control" relationship of the parties, the facilities should be subject to emission limits prescribed by the Clean Air Act through the EPA.

Response:

The landfill is operated separately from the energy plant. If the energy plant can't take the gas for whatever reasons, the landfill flares it. That the plant is not obligated to take LFG if and when there would be no economic benefit to Seneca Energy does not indicate common control, but rather underscores the independence of the LFGTE plant.

Comment 7.

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?

Response:

Ontario County Landfill has the option to send LFG to the energy plant or flare the gases. If the energy plant shuts down, the landfill can flare the gas or sell it to another end user. Obviously the current economics drive sending the LFG to the energy plant fostering electricity generation rather than wasting the fuel resource. Seneca Energy, while able to burn natural gas in its engines, uses LFG because it's cheaper. The new high pressure Millennium gas line is approximately 2 miles west and is well within reach for a possible connection if needed. A lower pressure gas line runs close by along Routes 5 & 20. This line currently fuels the glass dryer at the eCullet, Inc glass recycling facility located in a leased building on the landfill property. Seneca Energy currently chose not to tap into one of those lines because it would be more expensive to do so. If the landfill shuts down or stops taking refuse for any reason the energy plant could still operate on natural gas. However, landfill gas would still be generated for years to come albeit at a lower volume.

Comment 8.

Does one operation support the operation of the other? What are the financial arrangements between the two parties?

A Gas Purchase Agreement (GPA) entered into by the three parties, and dated January, 2008, explains the transfer of interest in economic incentives, such as tax credits from the County to Casella, to be shared equally between Seneca Energy and Casella. In addition, the GAA also provides for a 50-50 share between the parties in any tax credits (GAA, pg. 15). This sharing of economic incentives in an equal manner indicates that the parties share common control. Schedule A (GAA, pg. 14-15) entitles the County to a 50% royalty for any electricity sold by Seneca Energy over $ .04 per kwh, with arrangements for cost-of-living increases.

Response:

Item 12 of the Execution Copy of the GAA states:
"This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between the parties or to impose any partnership obligation or liability upon either party. Neither party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent of, representative of, or to otherwise bind, the other party."

Although Ontario County, Casella and Seneca Energy have a business arrangement that includes the sharing of tax credits, there is no indication that the parties, by entering into such a mutually beneficial business relationship, established a business relationship over the other through the sharing of tax credits. Even if the sharing of tax credits provided some small indicia of control, the facts and circumstances presented here do

not establish that a control relationship exists, especially in light of the numerous factors indicating that the two facilities are separate. Also, as mentioned earlier, Seneca Energy has the ability under the Gas Assignment Agreement (GAA) to discontinue taking landfill gas from the County Landfill at any time if gas adversely affecting Seneca Energy's operation or if economic conditions warrant it. Because Seneca Energy's engines can combust natural gas and given the proximity of major pipelines, Seneca Energy has the ability to fuel the power plant on natural gas instead of landfill gas. Currently, Ontario County generates more gas than Seneca Energy can handle and thus flares the excess. That will change when the additional engines are approved and operational, resulting in Seneca Energy having the capacity to take all the gas the landfill can generate until (and if) the landfill expands.

Comment 9:

It is clear from this application that the Ontario County Landfill Gas to Energy Facility (OCLGTE) intends to expand its operations in conjunction with the expansion of the Ontario County Landfill expansion project, which is impermissible under SEQR.

Response:

Seneca energy has provided information documenting that the new plus the existing generator engines can operate at capacity for 10 years on gas projected to be generated by the existing landfill, without the landfill being expanded. As a result, expansion of the energy plant is not dependent on the proposed landfill expansion. This was referenced in the SEQR Negative Declaration dated July 11, 2012.

Comment 10:

Page two of the Noise Impact Assessment state that the proposed 3 Engine facility will consist of "Ancillary equipment that supports the proposed additional electricity generation operations. Please provide an itemized list of the ancillary equipment including silencers for the engines.

Response:

Information regarding engine mufflers was provided in the June 22, 2012 submission.

Comment 11:

Seneca Energy also states that the proposed engines will be housed within a building, which "significantly attenuates engine noise." Please provide the engineering drawings of the proposed building. Please calculate the attenuation provided by the building.

Response:

The Department has not required engineering drawings for the building to be submitted. Building attenuation of mechanical noise greater than 20 dB would make the addition of the mechanical noise 0 dB when added to the exhaust noise level indicated. Application materials indicated both the building where the measurements were taken, and the building to contain the new engines, to be of concrete block construction. An 8 inch thick "light weight" concrete block wall will provide 34 dB attenuation. See Table 3 in section 3.4.2 for sound transmission through various materials, at:
http://www.fhwa.dot.gov/environment/noise/noise_barriers/design_construction/design/design03.cfm

Comment 12:

Please provide details as to the construction and exact location of the soil berm which has "been constructed between the LFGTE facility and offsite receptors." Please provide calculations as to the attenuation provided by this berm.

Response:

The May 2012 Noise Assessment did not claim any noise attenuation due to the presence of the berm, and showed the increase at the nearest receptors to be limited to 1dB. The Department does not require new calculations based on the presence of the berm, the configuration of which is shown by contour lines on the Noise Assessment Site Plan.

Comment 13:

Please provide a map with the exact locations of the monitoring locations which "included all (4) sides of the 8-engine facility.

Response:

The Department does not require a new map to show locations 50 and 100 feet from the building. Note that 100 feet is less than the approximately 170 foot east-west dimension of the building. Given the extended nature of the 8 separate exhaust locations, the specific points 50 and 100 feet from the building are not critical (see below).

Comment 14:

Since monitoring was initiated "after landfill operational hours", on 4/30/12 and monitoring which was performed on a 7-engine facility in 2010 per the 2011 Ontario County Landfill Annual Report during operational hours, "(7:00 AM to 10:00 PM) please explain how the noise level is reported as 5 dBA louder when the landfill is not in operation.

Response:

The 2010 noise levels taken with 7 engines operating were the average of multiple instantaneous readings taken at intervals to be "without the influence of any background noises such as heavy truck traffic or airplanes."

The 4/30/12 noise levels were taken with a meter equipped with a data logger recording readings every second to better represent the steady state sound level (L_{eq}).

The readings in both cases excluded operations of heavy equipment at the landfill, 2010 readings by taking a reading at instants avoiding other noises and 4/20/12 by readings after landfill hours.

The 4/20/12 readings included not only one extra engine, but also background noise from the nearby Route 5 & 20, which is a heavily travelled route for large trucks as well as cars.

Comment 15:

Assuming that the difference between the sound levels of the 3516IC engines is zero, the addition of one engine should have resulted in a sound level of 77.7 on the South side of the 8 -engine building. {DEC-Assessing and Mitigating Noise Impacts, 2001, page 8, (2). The results of the testing on 4/30/12 indicated that the sound level is approximately 3 dBA higher than expected. This is especially concerning due to the

reported lack of operations at the landfill at the time that the higher reading of 80.6 dBA occurred.

Response:

The relationship of sound level with distance producing an attenuation of 6 dB with distance doubling does not hold for a linear, rather than a point source. When nearer to a building than it's linear dimensions, with multiple sources not in the same location (not a point source), the attenuation from a linear array of sources is more like a linear source (ex. a road), with attenuation of 3 dB per doubling of distance. The farther from the building, the more the multiple sources act as a point source, and -6dB per distance doubling would apply at distances significantly greater than the separation between the sources. The "higher reading" was due to the measurement being taken at the side of the building closest to the exhaust stacks. Monitoring "after hours" eliminates intermittent noise of other equipment at the site.

Comment 16:

Table 1 presents the results of the 8-engine facility monitoring. Please provide a map with the exact locations of these measurement sites.

Response:

Measured distances of 50 and 100 feet from the structure are sufficient. See comments regarding linearity and extended sources above.

Comment 17:

Table 3 fails to include a description of the building at the DANC facility where these measurements were performed. Please provide building measurements including the wall thicknesses, and distance of engines from the interior walls. Please provide a map of the locations at which all 4 measurements were done, with distances marked.

Response:

See preceding response above. The applicant has indicated the structure and equipment will be of the same design as at the measured site. The Department has not required detailed design drawings of the proposed building, which must be constructed to withstand constant long term engine vibration. See link above for "light weight" block building wall attenuation.

Comment 18:

Sound levels "were projected to the nearest offsite receptors." The Department's Assessing and Mitigating Noise Impacts, 2001, states "Solid Waste regulations require the measurement of sound levels be at the property line."{page 13,(b)}."

Response:

For the LFGTE facility, there is no Part 360 application or permit.

Comment 19:

Please include "distances for each point of receptors, including the distance and the point in time when operations will be closest to receptors, as per this policy and Part 360 regulations. Please provide the specific attenuation factors used in this assessment.

Response:

See noise analysis provided by applicant for distances and distance attenuation. Note that the LFGTE engines will not move.

Comment 20:

It should also be noted that a letter dated June 22, 2012 describes the addition of Silex JC-16 cylindrical silencers to the Caterpillar G3520C engines at the DANC facility. The explanation provided states that the difference between the rated sound levels of these engines based on a technical data sheet of 85 dBA (mechanical free field) and 86.1 dBA (exhaust free field) and the measured sound levels of the 3 engines is due to the addition of the silencers, and the attenuation provided by the DANC building.

With no attenuation and assuming a difference in sound levels between the 3 engines of zero, the three engines would have a sound level of 92 dBA. (See DEC Assessing and Mitigating Noise Impacts, 2001). One engine has a level of 86. Two engines would require the addition of 3 dBA, bring the total for 2 engines to 89 dBA. The addition of a third engine would require the addition of 3 dBA, bringing the total for 3 engines to 92 dBA.

If each silencer provides a reduction of 30-38 dBA, and the attenuation of the building is 15 dBA, as provided for in the Department's policy,{page 10, (4)}, the measured sound levels for these 3 engines would be predicted at 47 dBA. Please provide an explanation of why the measured sound levels for these 3 engines is reported as 73.9 dBA.

Response:

These are "no muffler" values for exhaust only, based on the building attenuation of mechanical noise to more than 10 dB below the exhaust noise value. The "no muffler" noise level does not apply to the project as proposed.

The June 22 letter stated "*up to* 30 - 38 dBA". This was across the upper frequency range, 500 Hz and above. The accompanying attenuation graph showed approximately 20 dBA attenuation at the lower 63 Hz end of the noise spectrum. This is not an inconsistency. The noise level reported is a measured value including the entire audible range of sound frequencies.

Note also that the 15 dBA value given is for a residential structure in the role of receptor, not an industrial grade building designed to withstand engine vibrations, among other things. The 15 dBA value must allow for light weight wood construction as well as large areas of windows, which attenuate noise significantly less than heavier industrial construction.

Comment 21:

Re: 5.1 Construction Noise Assessment - Please specify the operational hours and the expected duration of this project.

Response:

The applicant specified daylight hours in the noise assessment. Duration is unknown, and will vary with factors such as weather and time of year.

Comment 22:

Re: 5.1 Construction Noise Assessment - Please provide a listing of equipment to be used, with the expected decibel levels of each piece of equipment, and their expected combined sound levels per the Department's policy. Please provide the details on the height and thickness of the soil berm, and the expected attenuation of this berm on sound levels during construction.

Response:

Temporary noise impact during construction will be intermittent and not quantifiable as a sum of added noise levels since all equipment will not operate simultaneously. Heavy earth moving equipment operation for building foundation construction will be limited to a relatively short period at the beginning of construction. It is not anticipated that building construction using earth moving equipment in the location shown will be significantly louder or longer in duration than the noise level from construction of the existing building approximately 150 feet away, or normal landfill operations using earth moving equipment in multiple locations at the site. Again, the configuration of the berm is shown by contour lines on the Noise Assessment Site Plan.

The Department has determined that issues raised in the comments received do not warrant a public hearing pursuant to 6 NYCRR Part 621.8.

EXHIBIT H

New York State Department of Environmental Conservation
Environmental Permits, Region 8
6274 East Avon-Lima Rd, Avon NY 14414-9516
Phone: (585) 226-5400 • **Fax:** (585) 226-2830
Website: www.dec.ny.gov

Joe Martens
Commissioner

September 11, 2012

Steven C. Riva, Chief
Permitting Section, Air Programs Branch
USEPA - Region 2
290 Broadway
New York NY 10007-1866

Regarding: **Proposed Title V Permit Renewal and Modification for Facility Expansion**
Application ID 8-3244-00040/00002
Seneca Energy II LLC - Ontario County Landfill Gas to Energy Facility
Town of Seneca, Ontario County

Dear Mr. Riva:

A Proposed Title V Permit, a renewal and modification of Seneca Energy II LLC's Title V Facility Permit referenced above, is available for review and comment for the required 45 day EPA review period.

Since EPA has electronic access to the Department's AFS computer system, a paper copy of the Proposed Permit is not enclosed with this letter. Presently, we intend to issue the Proposed Permit as a Final Permit after the 45 day period has ended, if EPA has not raised any objection.

Our office received comments during the public comment period, from Douglas C. Knipple, representing Finger Lakes Zero Waste Coalition Inc. A responsiveness summary is attached to address the comments received, along with a scanned copy of the December 22, 2011 letter from Casella, referenced in the response to Comment 4. No changes were made to the Proposed Permit from the Draft Permit based on comments received. Minor formatting changes may be evident due to updates in the Department's AFS database, which generates the Permits.

Please address any formal comments from EPA to my attention at this office. If you have any questions regarding the Proposed Permit, please contact either me, or Michele Kharroubi of our Division of Air Resources.

Sincerely,

Roger McDonough

Roger McDonough
Environmental Analyst
Division of Environmental Permits

cc(w/enc): M. Kharroubi - NYSDEC Division of Air Resources
P. Zeliff - Seneca Energy II LLC

EXHIBIT I

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

---X

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

Issued by the New York State Department of
Environmental Conservation

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

I. INTRODUCTION

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

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

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

On January 9, 2012, SE submitted to NYSDEC an application for renewal and modification of SE's Title V permit. On or about July 18, 2012, NYSDEC issued a public notice providing a draft proposed Title V permit modification for SE and an opportunity for the public to comment on the proposed permit, up to August 17, 2012.[1] On August 17, 2012, prior to the close of the public comment period, FLZWC submitted comments to NYSDEC on the application. FLZWC's comment letter is provided herewith as **Exhibit A**.[2]

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

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

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

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

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

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

NYSDEC during the initial public comment period in this matter.

II. SUMMARY OF THE ARGUMENT

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

III. BACKGROUND

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

History of NYSDEC's Common Control Determination

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

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

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

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

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

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

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

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

Id.

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

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

facility for PSD/NSR purposes.

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

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

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

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

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

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

> Casella confirms that the following facts set forth in the [SE Title V modification] Application are accurate:
>
> • The Landfill has the two-digit SIC Code, 49. To Casella's

knowledge, the LFGTE Facility also shares this SIC Code.
• The SIC Code for the Landfill is 4953.
• The LFGTE Facility is constructed on property leased directly from Ontario County.
The Landfill and other ancillary structures are constructed on land leased directly to Casella. The properties are contiguous.

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

On January 5, 2012, NYSDEC wrote to SE, determining that SE and the landfill are not under common control and accordingly "will continue to be treated as two separate facilities." Thomas L. Marriott, Regional Air Pollution Control Engineer, NYSDEC, Letter to Emily Zambuto, SE, January 5, 2012, provided herewith as **Exhibit M.**

Landfill Permitting

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

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

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

The SE-Landfill Relationship

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

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

[6] The LandGEM modeling software is available at <http://www.epa.gov/ttncatc1/products.html>.

8-9.[7]

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

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

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

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

scfm." *Id.*, p. 9. However, the landfill plans to use the fourth flare to help control an elevated LFG generation rate. *Id. See also* FEIS, Appendix BB, Attachment G, p. 1, Table 1, and Table D-4.[8]

Second, the LandGEM calculation on which the LFG generation rate to be controlled is based excludes "beneficial use" materials utilized as alternative daily cover ("ADC"), substantial portions of which are degradable and ultimately disposed in the landfill. DEIS, p. 74.[9] Potential emissions of ADC included in a landfill's waste mass must be calculated for Clean Air Act applicability purposes.[10] The LFG generation rate for the existing and operating landfill is thus

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

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

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

substantially underestimated.

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

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

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

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

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

IV. ARGUMENT:

SE AND ONTARIO COUNTY'S LANDFILL ARE A SINGLE SOURCE

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

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

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

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

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

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

Common Control Factors

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

2004, Attachment, p. 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sham Permit

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

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

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

V. CONCLUSION

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

Dated: December 22, 2012

Respectfully Submitted,

Gary A. Abraham, Esq.
Attorney for Finger Lakes Zero Waste Coalition
170 No. Second Street
Allegany, New York 14706
(716) 372-1913

Enclosure: CD-ROM

To: Lisa P. Jackson, Administrator

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

U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Steven C. Riva, Chief
Permitting Section, Air Programs Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway, New York NY 10007-1866

Joseph Martens, Commissioner
N.Y.S. Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

Peter H. Zeliff
Seneca Energy II, LLC
2999 Judge Rd.
Oakfield NY 14125

EXHIBIT LIST

(found in accompanying CD-ROM)

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

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

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

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

X

FINGER LAKES ZERO WASTE COALITION, INC.
P.O. Box 865
Geneva NY 14456, and

KATHERINE M. BENNETT ROLL, as president of Finger Lakes Zero Waste Coalition, Inc.
3688 Number Nine Road
Geneva, NY 14456

Plaintiffs,

v.

GINA McCARTHY, in her official capacity as Administrator, United States Environmental Protection Agency,
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

and

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Defendants.

X

COMPLAINT FOR RELIEF UNDER THE CLEAN AIR ACT

Civil No. **14-cv-6542**

Assigned Judge/Magistrate:

Hon. Charles J. Siragusa. (TF)

Plaintiffs allege on information and belief as follows:

NATURE OF THIS ACTION

1. This is a civil action for declaratory and injunctive relief under the Federal Clean Air Act ("the Act"), 42 U.S.C. §§ 7401 through 7671q. This action seeks relief from the failure of defendant Gina McCarthy, Administrator of the Environmental

Protection Agency ("EPA"), to perform her non-discretionary duty to grant or deny an administrative petition submitted to EPA by the Plaintiffs pursuant to §505(b)(2) of the Act, 42 U.S.C. §7661d(b)(2). The petition that gives rise to this action seeks EPA's objection to a landfill gas-to-energy facility operating permit issued by the New York State Department of Environmental Conservation ("NYSDEC"). Under the § 505(b)(2) of the Act, 42 U.S.C §7661d(b)(2), EPA was required to grant or deny the petition within 60 days after it was filed. Though well over 60 days has passed since Plaintiffs filed their petition, EPA has not granted or denied any the petition.

JURISDICTION

2. This court has subject matter jurisdiction over the claim set forth in this complaint pursuant to 42 U.S.C. § 7604(a)(2) (citizen suit provision of Clean Air Act), 28 U.S.C. § 1331 (federal question statute), and 28 U.S.C. § 2201 (declaratory judgment statute). The relief requested is authorized by 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 7604.

3. Venue is proper in the Western District of New York pursuant to 28 U.S.C. § 1391(e)(2) because a substantial part of the events or omissions giving rise to the claim occurred in the Western District of New York.

NOTICE

4. On May 16, 2014, Plaintiffs provided notice to the EPA Administrator of plaintiffs' intent to file a citizen suit due to EPA's failure to comply with the 60-day deadline under 42 U.S.C §7661d(b)(2) for granting or denying the petition identified in Counts one through six of this complaint. The notice letter filed with respect to the petition involved in this action complies with § 304 of the Act, 42 U.S.C. § 7604(b)(2), and 40 C.F.R. Part 54.

5. More than 60 days have passed since the postmark on the notice letter. See 42 U.S.C. § 7604(b)(2). Defendant violated and remains in violation of 42 U.S.C §7661d(b)(2) by failing to grant or deny Plaintiff's petition.

PARTIES

6. Plaintiff Katherine M. Bennett Roll lives and owns property on Number Nine Road, in Geneva, New York, approximately 1,000 yards from the landfill gas-to-energy facility.

7. Plaintiff Finger Lakes Zero Waste Coalition, Inc., (hereafter, "FLZWC"), was incorporated on February 17, 2009 under New York's Not-for-Profit Corporation Law corporate status, with a mission "to promote air and water quality in the Finger Lakes Region of New York State in order to protect community health; to stimulate public interest and awareness in the areas of waste

reduction, responsible recycling and renewable energy; to cooperate with similar organizations in carrying out any of the purposes for which the organization is formed; and to engage in legislative activities in support of the purposes for which the organization is formed."

8. Pursuant to its mission, on December 22, 2012 FLZWC filed the administrative petition seeking EPA's non-discretionary action that provides the underlying subject of this complaint.

9. Plaintiffs' petition alleges, among other things, that the Clean Air Act, Title V permit issued for the landfill gas-to-energy facility is based on an incomplete permit application, fails to include adequate monitoring and reporting of compliance with air quality requirements, and illegally sanctions the violation of applicable requirements under the Act. While EPA delays action on Plaintiffs' petition, the facility that is the subject of the petition is allowed to operate pursuant to a defective permit. Thus, Plaintiffs are directly and adversely impacted by EPA's delay in granting or denying the petition.

10. Defendant Gina McCarthy is the Administrator of the Environmental Protection Agency. The Administrator is responsible for implementing the Clean Air Act, including the requirement to grant or deny Plaintiffs' petition within 60 days after they were filed. Defendant United States Environmental Protection Agency is an agency of the United States Government.

STATEMENT OF FACTS

11. On December 22, 2012, Plaintiffs filed a petition with EPA seeking EPA's objection to the Clean Air Act Title V operating permit issued by NYSDEC to the Ontario County Landfill Gas-to-Energy Facility, and operated by Seneca Energy II, LLC ("SE") (Permit I.D. DEC 8-3244-00040/00002) pursuant to 42 U.S.C. § 7661d(b)(2) (the "petition").

12. The SE facility is a major air pollution source located on the site of the Ontario County Landfill ("the landfill"), in the Village of Stanley, New York, with a business office at 2999 Judge Road, in the Cit of Oakfield, New York.

13. PlaintiffS filed the petition within 60 days after the expiration of EPA's 45 day period for review of the then-proposed Title V permit consistent with U.S.C. § 7661d(b)(2).

14. Plaintiff's petition was based upon objections raised during the public comment period consistent with U.S.C. § 7661d(b)(2).

15. PlaintiffS' petition complies fully with 42 U.S.C. § 7661d(b)(2).

16. Pursuant to 42 U.S.C. § 7661d(b)(2), EPA had 60 days to grant or deny Plaintiffs' petition.

17. More than 60 days have passed since EPA received Plaintiff's petition and EPA has not granted or denied

Plaintiff's petition.

FIRST CLAIM FOR RELIEF

Failure to Respond to Petition

18. Plaintiffs repeat and reallege each and every allegation contained in Paragraphs 1 through 18 as though fully set forth.

19. On December 22, 2012, Plaintiffs filed their petition with EPA pursuant to 42 U.S.C. § 7661d(b)(2).

20. EPA failed to grant or deny Plaintiffs' petition within 60 days, has not granted or denied Plaintiffs' petition after more than eighteen months, and has not granted or denied Plaintiffs' petition as of the date of this complaint.

21. EPA has violated, and is in violation of, its non-discretionary duty to grant or deny Plaintiffs' petition within 60 days as required by 42 U.S.C. § 7661d(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Honorable Court:

22. DECLARE that Defendants' failure to perform their nondiscretionary duty to grant or deny Plaintiffs' administrative petition within sixty days is a violation of §505(b) of the Clean Air Act, 42 U.S.C. §7661d(b);

23. ORDER Defendants to grant or deny the petition within

ten calendar days of this Court's ruling;

24. ORDER Defendants to comply with the 60-day deadline set forth at § 505(b) of the Act, 42 U.S.C. §7661d(b) for granting or denying public petitions seeking Defendants' objection to Title V permits;

25. ORDER Defendants to pay Plaintiffs their costs of litigation, including but not limited to reasonable attorney fees, as authorized in Section 304(d) of the Act, 42 U.S.C. § 7604(d); and

26. Grant such other relief as the Court deems just and proper.

Dated: Allegany, New York

September 16, 2014

By: _____

Gary A. Abraham, Esq.
Attorney for Plaintiffs
170 No. Second Street
Allegany, New York 14706
(716) 372-1913

EXHIBIT K

Ontario County Attorney

ONTARIO COUNTY COURTHOUSE
27 NORTH MAIN STREET, 4TH FLOOR
CANANDAIGUA, NEW YORK 14424
PHONE (585) 396-4411
FACSIMILE (585) 396-4481
(No service via e-mail or fax)

February 24, 2015

VIA E-MAIL AND U.S. MAIL
Lisa Schwartz, Esq.
NYS DEC Region 8
Division of Legal Affairs
6274 East Avon-Lima Rd.
Avon, NY 14414-9519

Re: Ontario County Landfill Expansion Project
DEC Project Nos. 8-3244-00004/00007, 8-3244-00004/0021 and 8-3244-00004/00001

Dear Lisa:

In response to your December 18, 2014 e-mail, I am writing to confirm that, except as noted below regarding the March 2013 easement, Ontario County ("the County") is not aware of any factual changes with regard to the issue of common control of the Ontario County Landfill ("the Landfill") and Seneca Energy II's ("Seneca Energy") Ontario Landfill LFGTE facility ("the LFGTE facility") since the DEC's January 5, 2012 letter. Those facts are as follows:

- The LFGTE facility is constructed on property leased directly from the County to Seneca Energy. In March of 2013, an easement was granted by the County to Seneca Energy to allow electric power lines associated with the LFGTE facility to cross Landfill property;
- The Landfill and related structures are constructed on land leased directly from the County to Casella Waste Management of NY ("Casella"), which operates and manages the Landfill pursuant to an operating agreement between the County and Casella;
- The Landfill and the LFGTE facility properties are contiguous to each other;
- Seneca Energy, as operator of the LFGTE facility and Casella as operator of the Landfill, are responsible for the operation of the power plant and Landfill, respectively, but have no responsibilities for each other's operations;
- Casella and the LFGTE facility do not share common workforces, plant managers, security forces, corporate executive officers, or board of executives;
- The Landfill and the LFGTE facility do not share equipment, other property, or pollution control equipment beyond the fact that the Landfill's LFG collection system delivers landfill gas to the LFGTE Facility under the 2003 Gas Assignment Agreement between Seneca Energy's predecessor and the County.
- The Landfill and the LFGTE facility do not share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions;

- The Landfill and the LFGTE facility are not solely dependent upon each other;
- If Seneca were to shut the LFGTE facility down, Casella would retain title to the LFG produced at the Landfill and would continue to operate the Landfill pursuant to its operating agreement with the County;
- The Title V permit for the Landfill contains permitted flares that have the ability to combust all LFG produced by the Landfill.

Very truly yours,

Kristen J. Thorsness, Esq.
Assistant County Attorney

EXHIBIT L

THE WEST FIRM
A PROFESSIONAL LIMITED LIABILITY COMPANY

Thomas S. West
Direct Dial: (518) 641-0501
Direct Facsimile: (518) 615-1501
E-Mail: twest@westfirmlaw.com
Admitted in New York and Pennsylvania

January 22, 2015

VIA ELECTRONIC & U.S. MAIL

Lisa Schwartz, Esq.
NYS DEC Region 8
Assistant Regional Attorney
Division of Legal Affairs
6274 East Avon-Lima Rd.
Avon, NY 14414-9519

Re: Ontario County (Ontario County Landfill Expansion)
DEC Project Nos. 8-3244-00004/00007, 8-3244-00004/0021
and 8-3244-00004/00001

Dear Lisa:

This letter responds to your e-mail correspondence, dated December 18, 2014, requesting confirmation from our client, Casella Waste Systems, Inc. ("Casella"), regarding factual issues related to common control between the Ontario County Landfill (the "Landfill") and the Ontario Landfill LFGTE Facility, DEC ID 8-3244-00040, operated by Seneca Energy II, LLC (the "LFGTE Facility"). On January 5, 2012, the Department made a determination that the LFGTE Facility and the Landfill would continue to be treated as two separate facilities for purposes of New Source Review and PSD purposes under 6 NYCRR Part 231 (the "Aggregation Decision").

Your December 18, 2014, e-mail asked that Casella review the facts relevant to the Aggregation Decision and confirm whether those facts remain true for Casella's operations. Casella has reviewed the documents referenced in your December 18, 2014, e-mail and confirmed that Casella's operations are consistent with, and have not changed from, the description contained in the December 22, 2011, letter to Michele Kharroubi from David Carpenter on behalf of Casella (the "2011 Casella Letter"). Casella's confirmation of these facts is subject to the same limitations as to its knowledge of facts related to Seneca Energy II, LLC, and the LFGTE Facility, as stated in the 2011 Casella Letter.

By copy of this letter, we are requesting that Ontario County and Seneca Energy II confirm whether any of the facts that formed the basis of the Aggregation Decision have changed since the date of the Aggregation Decision.

Should you require any further information, please do not hesitate to contact me.

Very truly yours,

Thomas S. West

TSW/tms

cc: Kristen Thorsness, Esq.
Dennis Plaster
Casella Waste Systems, Inc.

EXHIBIT M

Seneca Energy II, LLC
2999 Judge Road
Oakfield, NY 14125-9771
Phone: (585) 948-8580 FAX: (585) 948-8584

February 27, 2015

Via Email and U.S. Mail
Lisa Schwartz, Esq.
NYSDEC Region 8
6274 East Avon-Lima Road
Avon, New York 14414-9519

RE: Ontario County Landfill Expansion Project
DEC No. 8-3244-00004/00007, 8-3244-00004/0021 and 8-3244-00004/00001

Dear Ms. Schwartz,

On January 5, 2012, the Department made a determination that the LFGTE Facility operated by Seneca Energy II, LLC and the Ontario County Landfill would continue to be treated as two separate facilities for the purposes of New Source Review and PSD purposes under 6 NYCRR Part 231 (the "2012 Determination").

Your December 18, 2014, email asked that Casella review the facts relevant to the 2012 Determination and confirm whether those facts remain true for Casella's operations. And as presented in the January 22, 2015 letter, Casella's operations are consistent with, and have not changed from the description contained in the December 22, 2011 letter to Michele Kharroubi from David Carpenter on behalf of Casella. As owner and operator of the LFGTE facility, Seneca Energy II is not aware of any factual changes with regard to the issue of common control. Those facts are as follows:

- The LFGTE facility is constructed on property leased directly from the County to Seneca Energy. In March 2013, an easement was granted by the County to Seneca Energy to allow electric power lines associated with the LFGTE facility to cross Landfill property;
- The Landfill and related structures are constructed on land leased directly from the County to Casella Waste Management of NY ("Casella"), which operates and manages the Landfill pursuant to an operating agreement between the County and Casella.
- The Landfill and the LFGTE facility properties are contiguous to each other;
- Seneca Energy, as operator of the LFGTE facility and Casella as operator of the Landfill, are responsible for the operation of the power plant and the Landfill, respectively, but have no responsibilities for each other's operation;
- Casella and the LFGTE facility do not share common workforces, plant managers, security forces, corporate executive officers, or board of executives;
- The Landfill and the LFGTE facility do not share equipment, other property, or pollution control equipment beyond the fact that the Landfill's LFG collection system delivers landfill gas to the LFGTE facility under the 2003 Gas Assignment Agreement between Seneca Energy's predecessor and the County.
- The Landfill and LFGTE facility do not share common payroll activities, employees, benefits, health plans, retirement funds, insurance coverage, or other administrative functions;
- The Landfill and the LFGTE facility are not solely dependent upon each other;
- Seneca Energy has the ability under the Gas Sale Agreement to discontinue taking landfill gas from Ontario County at any time if gas is adversely affecting Seneca Energy's operations or if economic conditions warrant it. Because its engines can combust natural gas and given the proximity of major pipelines, Seneca Energy has the ability to fuel the power plant on natural gas instead of landfill gas.

If Seneca Energy were to run on an alternate fuel source or shut the LFGTE facility down, Casella would retain title to the LFG produced at the Landfill and would continue to operate the Landfill pursuant to it's operating agreement with the County;

- The Title V permit of the Landfill contains permitted flares that have the ability to combust all the LFG produced by the Landfill.

In addition, Seneca Energy has reviewed the following documents upon which DEC DAR relied in making the determination in the January 5, 2012 letter to Seneca Energy from Thomas Marriott: Ontario LF LFGTE Facility and Ontario County Landfill; Major Source/Facility Determination and has found that the originally submitted information has not changed.

- December 29, 2011 email from Emily Zambuto to Michele Kharroubi RE: Common Control Update
- December 22, 2011 letter to Michele Kharroubi from David G. Carpenter, Esq. (Casella) RE: Request for Determination on Issue of Common Control
- November 30, 2011 email from Emily Zambuto to Michele Kharroubi RE: Issue of Common Control Determination
- November 10, 2011 email from Michele Kharroubi to Emily Zambuto RE: Issue of Common Control Determination
- November 10, 2011 email from Jerry Leone to Michele Kharroubi RE: Confirmation of Information sent by Seneca Energy (Ontario LF LFG to Energy Facility)
- October 24, 2011 letter from Roger McDonough to Peter Zeliff acknowledging the receipt of the September 2011 submission and confirming that the permit application remains incomplete
- September 22, 2011 Request for Determination on the issue of common control for Ontario LF LFGTE Facility
- April 14, 2009 email from Pete Zeliff, Sr. to Michele Kharroubi RE: Ontario LF LFG to Energy Facility
- 2008 Gas Purchase Agreement

Should you require any additional information please do not hesitate to contact me.

Respectfully submitted,
Seneca Energy II, LLC

Richard M. DiGia
President and CEO