



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JAN 10 2012

Troy D. Breathwaite, Air Permits Manager
Virginia Department of Environmental Quality
Tidewater Regional Office
5636 Southern Blvd.
Virginia Beach, VA 23462

Dear Mr. Breathwaite:

In a letter dated December 1, 2010, the Virginia Department of Environmental Quality (VADEQ) requested the opinion of the U.S. Environmental Protection Agency (EPA) regarding whether VADEQ should treat as a single source for permitting requirements under the Clean Air Act (CAA or Act) the following facilities: General Power Corporation Green Energy L.L.C. (GPC), a co-generation facility; Southeastern Public Service Authority (SPSA) – Suffolk Regional Landfill (Suffolk); Suffolk Energy Partners, L.L.C.; and BASF Corporation – Suffolk (BASF). It is EPA's understanding that VADEQ has previously determined that SPSA and Suffolk Energy Partners, L.L.C. are a "single source" for purposes of title V permitting under the Act, and EPA is not providing comment on that determination. Therefore, SPSA and Suffolk Energy Partners, L.L.C. will be referred to herein as "SPSA-Suffolk." Specifically, EPA is evaluating at your request whether GPC and SPSA-Suffolk should be treated as a single source for CAA permitting and whether GPC and BASF should be treated as a single source for CAA permitting.

According to your December 1, 2010, letter and subsequent correspondence:

- GPC has proposed to construct and operate a gas-to-energy co-generation facility to combust a mixture of treated landfill gas and natural gas to produce electricity and steam for BASF.¹ BASF's boilers would be placed on backup operation status to be used only during malfunctions at GPC.
- GPC will locate on property owned by BASF. Pursuant to the power purchase agreement (PPA) between GPC and BASF², GPC will provide electrical and thermal

¹ According to information GPC conveyed to EPA during a telephone call on April 28, 2011, GPC claims it may not provide electrical energy to BASF based on some recent revisions to Virginia law on this subject. However, the power purchase agreement between GPC and BASF provides for GPC to produce electrical and thermal energy for BASF. Until such time as GPC provides information in writing negating the electrical energy provisions of that contract, EPA assumes GPC will provide electrical energy to BASF. In addition, as discussed later, because GPC will provide all of BASF's thermal energy, whether or not electrical energy is provided to BASF will not likely alter EPA's analysis of the facts presented.

² Several pages are missing from the PPA and site lease that were forwarded to VADEQ and EPA. If those pages are significant, the companies may want to submit them for our consideration.

energy to BASF. Any electricity not used by BASF may be sold to the grid.³

- There is a site lease agreement between GPC and BASF, which has a term equal to the power purchase agreement term, and which provides for GPC to pay rent to BASF of \$1/year for the use of BASF's property for GPC's operations.
- A contractual agreement between GPC and Suffolk Energy Partners, L.L.C. requires Suffolk Energy Partners, L.L.C. to sell 100% of the landfill gas collected from the SPSA Landfill to GPC. In turn, this agreement also requires GPC to purchase 100% of the landfill gas collected.
- SPSA-Suffolk includes a municipal solid waste landfill with a leachate collection system, landfill gas collection and control equipment, and landfill gas combustion equipment (four landfill gas-fired generators and a flaring system). Suffolk Energy Partners, L.L.C. operates the landfill gas collection and control system and combustion equipment. The operation of the four gas-fired generators and flaring system will be discontinued when landfill gas is provided to GPC.
- Treated landfill gas is presently sold by SPSA-Suffolk to BASF for use as fuel in BASF's steam boilers. This gas is currently transported via a 2.3 mile pipeline. This same pipeline will transport treated landfill gas to GPC when landfill gas is provided to GPC.

“Single Source”

As stated above, EPA is evaluating at your request whether (1) GPC and SPSA-Suffolk should be treated as a single source for CAA permitting; and (2) whether GPC and BASF should be treated as a single source for CAA permitting.

For facilities to be a single source of regulated pollutants (other than hazardous air pollutants⁴) under the Prevention of Significant Deterioration (PSD), nonattainment New Source Review (NSR), and title V programs of the Clean Air Act, the following three criteria must be satisfied: the facilities are located on one or more contiguous or adjacent properties; the facilities are under the control of the same person (or persons under common control); and the facilities share the same two-digit (major group) Standard Industrial Classification (SIC) code (or one facility is considered a support facility to the other). See 40 C.F.R. §§ 70.2, 71.2, 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6), and 52.21(b)(5) and (6).

EPA has reviewed the information VADEQ provided to us regarding these facilities in order to provide guidance on whether the Agency would consider these entities to be a single source.

³ See footnote 1 for a discussion on electrical energy services between BASF and GPC.

⁴ It is important to note that the two-digit SIC code (or support facility test) is not used in determining the source of hazardous air pollutant emissions under Section 112 of the Act, including the Section 112 major source definition in title V. Rather, sources of these emissions are determined without regard to the two-digit SIC code or the support facility test. See Sections 112(a)(1) and 501(2) of the Clean Air Act and National Mining Assoc. v. EPA, 59 F.3d 1351, 1356 (D.C. Cir. 1995).

GPC and SPSA-Suffolk

First, EPA analyzed whether these two sources are on contiguous or adjacent property. The GPC and SPSA-Suffolk landfill are not located on the same property and are separated by roughly two miles, but are (and will be) connected by a dedicated pipeline. EPA has never established a specific distance between facilities for determining whether two non-contiguous facilities are "adjacent," but EPA has repeatedly included an evaluation of the nature of the relationship between the facilities in determining whether multiple non-contiguous emissions points should be considered a single source. See Letter from Kathleen Henry, Chief, Permits and Technical Assessment Branch, U.S. EPA Region 3, to John Slade, Chief, Division of Permits, Pennsylvania DEP, January 15, 1999 at 1 ("determining whether facilities are contiguous or adjacent depends not only on the physical distance between them but [also] on the type of nexus (relationship) between the facilities" and identifying questions to ask of facilities including whether materials are routinely transferred); Letter from JoAnn Heiman, Chief, Air Permitting and Compliance Branch, U.S. EPA Region 7, to James Pray, Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, PLC, December 6, 2004 at 2 ("Generally, the closer two facilities are the more likely they may be considered contiguous or adjacent. In addition, the existence of a dedicated pipeline or transportation link... may also be relevant to this determination."). See also Letter from Pamela Blakley, Chief, Air Permits Section, U.S. EPA Region 5, to Don Sutton, Manager, Permit Section, Illinois Environmental Protection Agency, March 14, 2006 at 2 (determining that four facilities operated by one company, but located up to eight miles apart, were a single source because "the activities occurring at these sites all assist in supporting" the main manufacturing operation of the company); Memo from Robert G. Kellam, EPA OAQPS, to Richard R. Long, Director of U.S. EPA Region 8 Air Program, August 27, 1996, at 3 (explaining that the contiguous or adjacent analysis is "determined on a case-by-case basis, based on the relationship between the facilities"); Letter from Richard R. Long, Director, Air Program, U.S. EPA Region 8, to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality, "Response to Request for Guidance in Defining Adjacent with Respect to Source Aggregation," May 21, 1998 at 2 (noting that "a determination of 'adjacent' should include an evaluation of whether the distance between two facilities is sufficiently small that it enables them to operate as a single 'source.'").

Two important questions that can be addressed in determining whether facilities are "adjacent" are whether materials will routinely be transferred between facilities by a physical link, such as a pipeline or railway, and whether the production processes are split between the facilities, such that one facility produces an intermediate product that requires further processing at the other facility with associated air pollutant emissions. See Long Letter to Menlove at 2 and Henry Letter to Slade at 2.

As noted above, there is already a 2.3 mile pipeline linking the two facilities, and the treated landfill gas from SPSA-Suffolk will routinely be sent to GPC via that pipeline. See also Kellam Memo to Long at 3 (finding that a brewery and a land farm about 6 miles apart were contiguous or adjacent because a pipeline physically connected them and operations were dependent upon use of the pipeline). Regarding the processing of the landfill gas, VADEQ's December 1, 2010 letter to EPA indicated that a "contractual agreement established between

GPC Green Energy L.L.C. and Suffolk Energy Partners, L.L.C. would allow for all (100%) of the collected and treated landfill gas to be purchased for use by the GPC Green Energy L.L.C. co-generation facility.” This contractual agreement also requires Suffolk Energy Partners, L.L.C. to sell 100% of its landfill gas to GPC. From the information provided to EPA, it appears that material (landfill gas) will be routinely transferred between GPC and SPSA-Suffolk by a pipeline and SPSA-Suffolk will routinely provide an intermediate product (landfill gas) to GPC – a product which is essential to GPC’s operation. The activities at SPSA-Suffolk appear to support the main combustion operation at GPC. See Blakley Letter to Sutton at 2 (finding a single source where many sites support the main manufacturing operation of the company.)

Therefore, based on the case-specific information provided by VADEQ regarding this criterion and the relationship between GPC and SPSA-Suffolk, EPA believes that it is appropriate for VADEQ to consider these two facilities as being “adjacent.”

Second, based on our review of the information VADEQ has provided, EPA believes that GPC and SPSA-Suffolk are “under common control.” Establishment of “common control” is determined by the permitting authority on a case-by-case basis based on the facts presented. In assessing common control, EPA first determines whether the facilities are commonly owned, e.g., one company is a parent company to the other or one company owns part of the other company. Common control can also be established if an entity has the power to direct or cause the direction of the management and policies of another entity. This direction could be as a result of the ownership of stock, or voting rights, by the existence of a contract, lease, or other type of agreement between the facilities, or through another means.⁵

There are a number of factors supporting a determination that GPC and SPSA-Suffolk are under common control. EPA’s review of the information provided by VADEQ indicates that GPC and Suffolk Energy Partners, L.L.C. are contractually obligated to purchase and sell landfill

⁵ The phrase “common control” is not defined in the Clean Air Act, or in EPA’s regulations that pertain to title V or PSD. In an early NSR rulemaking, however, EPA rejected a simplified test of control based on some specified voting share, instead stating that “[c]ontrol can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity” and further explained that EPA would “be guided by the general definition of control used by the Securities and Exchange Commission, [in which] control ‘means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.’” 45 Fed. Reg. 59874, 59878 (September 11, 1980) (quoting 17 C.F.R. § 210.1-02(g)). This definition is echoed in other Securities and Exchange Commission regulations, such as in 17 C.F.R. § 230.405, which defines “control” as including the term “under common control with” and as meaning “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” See also 17 C.F.R. § 240.12b-2. See also August 2, 1996 Memorandum from John S. Seitz, Office of Air Quality Planning and Standards, *Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act*; May 11, 2009 Letter from Ronald J. Borsellino, Acting Director, Division of Environmental Planning and Protection, U.S. EPA Region 2, to Scott Salisbury, President, Manchester Renewable Power Corp./LES and Lawrence C. Hesse, President, Ocean County Landfill Corp.; and July 8, 2004 Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, Commissioner, New York State Department of Environmental Conservation, "Re: EPA's Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1."

gas from/to each other for a minimum of fifteen years with options to extend such obligations. Pursuant to the 15-year contractual agreement, Suffolk Energy Partners, L.L.C. will provide 100% of the landfill gas from SPSA-Suffolk to GPC, and GPC will purchase 100% of the landfill gas collected for its operational needs.⁶

Based on this contractual agreement, as well as the dependency of GPC on SPSA-Suffolk for fuel, EPA believes GPC to be under common control with SPSA-Suffolk.

Finally, according to VADEQ's December 1, 2010 letter to EPA, both SPSA-Suffolk Energy and GPC belong to the same two-digit (major group) Standard Industrial Classification (SIC) Code of 49, pertaining to Electric, Gas, and Sanitary Services. Therefore, the last criterion for "single source" status has been met.

Accordingly, based on EPA's review of the evidence provided by VADEQ as applied to the three single source criteria, EPA believes that it is appropriate for VADEQ to determine that SPSA-Suffolk and GPC are a "single source" for CAA permitting purposes.

GPC and BASF

First, GPC and BASF are located on contiguous or adjacent properties. In fact, GPC will be located on the property of BASF's Suffolk, Virginia site. GPC and BASF (which was previously known as CIBA Corporation) have entered into a site lease agreement which provides the terms for GPC's lease of real property from BASF.

Second, EPA believes the criteria for "common control" have been met between GPC and BASF. As discussed above, the establishment of "common control" is determined by the permitting authority on a case-by-case basis based on the facts presented. Here, the GPC plant is located on the BASF plant property. EPA has previously stated that such co-location creates a presumption of common control. See Letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division, U.S. EPA Region 7, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources, September 18, 1995, at 1 (discussing how one company locating on another company's land establishes a presumption of common control, but that this presumption can be rebutted). Rebuttal of the presumption of common control is the burden of the source, and no information has been provided by GPC or BASF to refute this presumption. If the presumption is not rebutted, then the facilities in question are determined to be under common control.

⁶ As mentioned above, VADEQ has previously determined that SPSA and Suffolk Energy Partners, L.L.C. are a "single source" for title V permitting purposes pursuant to the CAA. Suffolk Energy Partners, L.L.C. currently collects all the landfill gas from SPSA for use as fuel in its four engine-generators and also sells the treated landfill gas to BASF for use as fuel in its steam boilers. Therefore, EPA does not believe the fact that GPC's contract is with Suffolk Energy Partners, L.L.C. (and not with "SPSA-Suffolk") is relevant to the determination of common control between GPC and SPSA-Suffolk.

In addition to the presumption of common control, the following factors from the PPA show features of the relationship between GPC and BASF that are indicative of a common control relationship between these two entities:

- (a) GPC provides for 100 percent of BASF's electrical and thermal energy needs;
- (b) GPC can only sell electrical and thermal energy to third parties at market rates after all of BASF's needs are met;
- (c) BASF is obligated to purchase the electrical and thermal energy it needs from GPC and no other party;
- (d) When GPC is down for maintenance or is otherwise not operational, GPC is required to arrange for or provide back-up electrical and thermal energy to BASF. Additional expenses associated with supplying this back-up energy must be paid by GPC; and
- (e) The PPA provides for specific performance; namely, that each party can require that the other party comply with the terms of the agreement as written.

Note that this list of factors reflecting the common control relationship between GPC and BASF is not exhaustive, nor is it intended to be. It is intended only to further illustrate the common control relationship that exists between these facilities.

Finally, while GPC and BASF have different SIC codes, EPA believes they belong to the same industrial grouping because GPC is a support facility for BASF. EPA has previously stated that a support facility is considered to be part of the same industrial grouping as that of the primary facility it supports even if the support facility has a different SIC code. See 45 Fed. Reg. 52676, 52695 (August 7, 1980) ("Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code."); Letter from Richard R. Long, Director, Air Program, U.S. EPA Region 8 to Julie Wrend, Legal Administrator, Air Pollution Control Division, Colorado Department of Public Health and Environment, November 12, 1998 (a Single Source Determination for Coors/TriGen).

Upon review of the information VADEQ has provided regarding the relationship between GPC and BASF, we believe GPC is a support facility for BASF. For example, of the factors listed above which reflect common control, four of these factors, namely paragraphs (a) through (d), also reflect BASF's dependency on GPC and GPC's support of BASF. Additional factors highlighting this dependency/support relationship can be found in the PPA and in the site lease agreement. For example, the PPA states that GPC will construct and operate its facilities for the "sole purpose of selling Electric Energy and Thermal Energy generated by the burning of landfill gas" to BASF and any third parties, as provided in the agreement.⁷ Moreover, the PPA limited the rights of GPC and BASF to assign rights from the PPA to others without prior written consent of the other party.

⁷ See footnote 1 for the discussion on the provision of electrical energy.

Additionally, the site lease agreement between GPC and BASF provides for GPC to pay rent of \$1/year to BASF for the use of BASF's property for GPC's operations. In the event the PPA is terminated, the site lease agreement provides that any below-ground facilities and any improvements to the landfill gas treatment facility automatically become BASF's property. Also, upon termination of the PPA, the site lease agreement provides for GPC to offer BASF the opportunity to purchase any above-ground facilities installed by GPC and requires GPC to remove such facilities (or pay BASF's costs for removal) if BASF declines to purchase the above-ground facilities. This language reflects the interconnectedness between GPC and BASF.

Based on the information EPA has reviewed, GPC appears to be a dedicated support facility for the BASF plant⁸ and as such GPC and BASF should be considered to be in the same industrial grouping as BASF, the primary facility.

Further, based on EPA's review of the case-specific facts that VADEQ has provided, EPA believes that it is appropriate for VADEQ to determine that GPC and BASF are a "single source" for CAA permitting purposes.

In conclusion, three separate source determinations (SPSA-Suffolk, SPSA-Suffolk/GPC, and GPC/BASF) have been made at this site. However, the Agency believes that it is appropriate to find all entities listed above as meeting the definition of source collectively based on the single source criteria. This is because:

- (a) The criterion of contiguous or adjacent properties is met by location, physical connection (i.e., the landfill gas pipeline), and shared product (i.e., landfill gas);
- (b) The criterion of common control is met as a result of the circumstances and the contracts/agreements discussed above. In examining the contracts, it is important to note that both the site lease between GPC and BASF and the contractual agreement between GPC and Suffolk Energy Partners, L.L.C. are dependent on the power purchase agreement between GPC and BASF being in effect; and
- (c) The criterion of sharing the same two-digit SIC code is met as SPSA-Suffolk serves to support BASF by providing landfill gas and GPC supports BASF by using this landfill gas to provide electrical and thermal energy to the chemical company.

⁸ It is important to note that a facility need not be wholly dedicated to a primary facility in order to meet the definition of "support facility." Rather, it need only meet the definition of "support facility" as described in our 1980 rulemaking: "Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product." See 45 Fed. Reg. 52676, 52695 (August 7, 1980).

Because Virginia's title V program has been approved by EPA, it is the State's responsibility to ensure source determinations are consistent with minimum program requirements. Thus, this letter is provided as guidance to assist the permitting authority and is based on the information provided to us. This letter does not, however, constitute a final Agency action.

If you have any additional questions, please contact me at (215) 814-2173, or Mike Gordon at (215) 814-2039.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen Cox".

Kathleen Cox, Associate Director
Office of Permits & Air Toxics
Air Protection Division
U.S. EPA Region III