



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 16, 2011

Mr. James Capp
Chief, Air Protection Branch
Environmental Protection Division
Georgia Department of Natural Resources
4244 International Parkway, Suite 120
Atlanta, Georgia 30354

Dear Mr. Capp:

This letter is in response to your letter dated February 8, 2010, requesting that the U.S. Environmental Protection Agency make a common control determination concerning the landfill gas-to-energy plant that is owned, maintained, and operated by PowerSecure, Inc., and located on property leased from the Houston County Landfill in Kathleen, Georgia. Because Georgia's prevention of significant deterioration (PSD) and title V programs have been approved by the EPA, it is the State's responsibility to ensure that source determinations are made consistent with minimum program requirements. Thus, this letter is provided as guidance to assist the permitting authority in this applicability determination, is based on the information provided to us, and does not constitute a final agency action.

Based on the information provided, it is our understanding that Houston County Landfill generates the landfill gas that will be used by PowerSecure and has contracted with Flint Electric Membership Cooperative (FEMC) to purchase this landfill gas. Further, we understand that FEMC has contracted with PowerSecure to receive and treat the landfill gas, and then use it to generate electricity. According to the information you submitted, the PowerSecure facility will consist of two landfill gas-fired Caterpillar G3520C engine generators and associated support equipment, including a landfill gas treatment system.

As more fully explained below, the EPA agrees with the Georgia Environmental Protection Division (EPD) that it is appropriate to consider the facilities at the site to be under common control and therefore a single stationary source under the PSD program. The EPA made this determination after reviewing the submitted documents, including various agreements between the respective parties. Under the PSD program, a "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit a regulated [New Source Review] pollutant." The rule further defines "building, structure, facility or installation" as "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)..." See 40 CFR 52.21(b)(5) and (6); see also 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6).¹ Therefore for PSD purposes, three criteria need to be met in order for the facilities to be considered the same stationary source. These criteria are:

¹ In its August 7, 1980, preamble, the EPA explained that a PSD source "must approximate a common sense notion of 'plant'" and "must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of 'building,' 'structure,' 'facility,' or 'installation.'" 45 FR 52676, 52694-95 (August 7, 1980).

1. whether the facilities are located on one or more contiguous or adjacent properties;
2. whether the facilities are under the control of the same person (or persons under common control); and,
3. whether 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).²

Based on the information submitted by PowerSecure in its January 25, 2010, letter to Georgia EPD, the company agrees that the first and third conditions above are met. The proposed PowerSecure facility will be located on land leased by Houston County Landfill to FEMC, and subleased by FEMC to PowerSecure. Additionally, the landfill's SIC Code is 4953, which is the code for refuse systems, and the SIC code for FEMC and PowerSecure is 4911, which is the code for electric services. (Major group 49 covers electric, gas, and sanitary services.) This leaves the remaining issue of common control.

In assessing common control, the 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.³ For examples of the types of information that are instructive in the process of determining whether common control exists, see the 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.

A common control relationship is presumed when one company locates on another's property. Once a presumption of common control has been established, the facilities in question can provide information which rebuts the presumption. However, the rebuttal of the presumption is the burden of the facilities. If the presumption is not rebutted, then the facilities in question are determined to be under common control. In this case, common control is presumed because PowerSecure, under subcontract to FEMC, has located on Houston County Landfill's property. Because of this action, a common control relationship between Houston County Landfill, PowerSecure, and FEMC is presumed.

² It is important to note that the two-digit SIC code (or support facility test) is not used in aggregating hazardous air pollutant emissions under Section 112 of the Act, including the Section 112 major source definition in title V. Rather, these emissions are aggregated without regard to the two-digit SIC code or the support facility test. *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).

³ 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.

The presumption of common control is explained in the September 18, 1995, 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 Dept. of Natural Resources. Page 1 of the Spratlin Letter states:

Typically, companies don't just locate on another's property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another. Therefore, we presume that one company locating on another's land establishes a 'control' relationship.

In addition to the presumption of common control between Houston County Landfill, PowerSecure, and FEMC, the following factors⁴ from the landfill gas purchase and sales agreement between Houston County Landfill and FEMC support a determination of common control between these three entities:

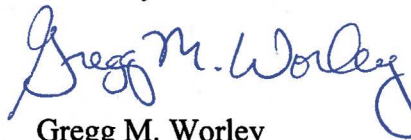
- (a) FEMC, which purchases the landfill gas, is not permitted to sell, redirect, transport or market the landfill gas, or any portion thereof to any third party;
- (b) FEMC is only permitted to use the landfill gas for electricity generation at the processing site; and
- (c) The landfill gas purchase and sales agreement provides for specific performance; namely, that each party can require that the other party comply with the terms and conditions of the agreement as written.

It should be noted that this list of factors reflecting the common control relationship between Houston County Landfill, PowerSecure, and FEMC is not exhaustive, nor is it intended to be. It is intended only to further illustrate the common control relationship that exists between these entities.

For the reasons specified above, the EPA concurs with the Georgia EPD that it is appropriate to find that Houston County Landfill, PowerSecure, and FEMC are one stationary source under PSD.

If you have any questions regarding the above, please contact Heather Ceron at (404)562-9185 or ceron.heather@epa.gov.

Sincerely,



Gregg M. Worley
Chief
Air Permits Section

cc: Mark Huncik, PowerSecure Inc.

⁴ The term "factor" in this letter refers to a feature of the relationship between Houston County Landfill, PowerSecure, and FEMC that EPA finds indicative of a common control relationship.